Law of Charter party.

Whenever a merchant agrees with a master or owner of a vessel to carry goods to a certain place he is said to charter the vessel Com. Dig Mercht. E. 2.

It commonly is so much per ton the consideration or sum in gross. the agt. must be in writing to be binding as a charter party. unless it is written upon. when being thus hired A vessel is sometimes chartered for outward voyage or only. sometimes for the inward, sometimes both.

The law of charter parties differs from the C. L. If the chartered vessel does not arrive at the port of delivery — the merchant is not to pay If she is lost returning the inward voyage is not to be paid for where the two voyages are engaged separately —

But if the voyage outward & inward is made one only then whether lost going or coming the charterer has nothing to pay. 2 Vent. 212

This is mercantile law. C. L. knows nothing of it — It goes upon the principle of encouraging the law for the encouragement of commerce. the merchant losing the goods & the owner or master the ship. —

Suppose the ship is chartered out & in — she arrives safe but there is no return freight — the merchant provided none — he must pay freight — But if it was owing to the captain or owner that she returned empty the mercht. is to pay only the outward freight & the master is liable for damages

Notice of the adjournment is to be given by the merchant to the arbitrator by a simple note the first opportunity.

The qeq.ⁿ if parol it is binding if entered upon a (but ought to be reduced to writing) & if earnest money is p.ᵈ & the party receives as the money which it remains in parol mun.ᵗ the earnest is forfeited.

Suppose instead of being lost she gets damaged & the goods are injured — the merchant may abandon the goods, then he need not pay the freight, but if he will not abandon he must pay the whole freight. He of course will abandon if the freight is worth more than the cargo saved — if not. he will not 2 Bur. 882. 888.

Suppose again the ship disabled by storm without fault of the master he puts in to refit & thus proceeds it is the same as if she was not injured. — If he cannot refit he may abandon the job. Or engage another vessel to carry the goods and save his bargain. He may have a reasonable time to refit.

If the vessel cannot proceed. if the supercargo cares & will take the goods & proceed with them in another vessel he must pay — pro rata. — and this is not an uncommon method

This contract of a charter party is different from all other mercantile transactions — They are sealed.

A agrees by parol to charter B's vessel for $1000 & hires $100. he may afterwards be off but forfeits the $100 cannot recover & this right is reciprocal if B. is off he must pay back the $100 & also $100 more. & this even if the contract is in writing if not sealed. & is properly

1 T. Rep. 18.78.

Raym. Rep. 85. 194

Molloy. 220.

1 Vent. 190. 238
1 Mod. 85.
Ld Ray. 918.

In the case of carriers the words acts of God mean such acts only as could not happen by the act of man. 1 T.R. 33
Ships not governed by admiral law which is a corporeal contrary
1 Vent. 238.

honourable. —

Damages Injury to the ship may arise from the impruence of the master as sailing in a storm or unseaworthy &c. the loss falls upon the master and the owner of ship both. but if the damage is by the act of God the merchant loses. —

The owner of a vessel is always liable for the misconduct of the captain or any boy who has the command of the vessel. whether they know of the given voyage or not. the may the may be answerable over to the owner however. all any person in Eng & U.S. have by ship owning

The owner sometimes enters into a contract with the Charterer under penalty to answer all damages yet the effect is increase the damages. as the penalty is commonly greater than the damages. Owners are also answerable for all the goods embezzled by the hands or the master even when he knows nothing of the hands employed. by M. L. (In Eng.d however the liability extends only to the worth of the Ship.) I have been speaking of seavoyages but packet masters & coasters are viewed in the same light as common carriers. being liable for every loss except by the act of God or a public enemy. — There is another power that masters of vessels have to bind the owners for necessaries for provisions, repairs &c & this altho the master might have been furnished with money for those

Observe however that the master cannot bind the owners beyond the value of the ship. 1 Ld. R. 78. & if the owner will abandon the ship he is not liable on the Captain's contract. The master is the servant of the owners. 2 Vern. 643.

Hard. 85. 195.

Cartt 26
Th. Ray 235
2 Vern 643.
Ld Ray. 223. 1285
Hard. 470.
1. Vent. 297.

purpose — The common way is to mortgage the ship & the ship will always be liable. — & the master's contract bind the owners. — this is for the encouragement of commerce. — The ship must be furnished & in distress — These debts are considered as meritorious debts of honour. 1 Hardres 376. 2 Vern 443. Comp. 636. 1 T. Rep. 73. 108. 1 Atk. Bl. 119.
if the contracts are to be for the benefit of the owners. they are liable — And here where the owner has no interest in the voyage the vessel has gone out of his hands & leased to some one — & he knows nothing of the voyage.

The owners of a ship are about to send their ship on a voyage — there being a number of owners the majority of interest directs the voyage — The minority cannot be obliged to contribute any thing, if they do nothing they lose the voyage If the vessel is lost the majority lose the cargo & ~~[illegible]~~ — but the minority get nothing for their part of the ship. —

The majority may apply to a court of Admiralty & secure the share of the vessel to the minority the majority have all profitt. or the minority may apply for security. If a good voyage is made when neither party have applied the minority can compel the majority to divide the profits by paying up their share of the expenses & the interest. —

Hand. 85. 194

2 Ababa 259

The master as agent for the owners has an implied authority to do all that is necessary as to hire hands — to receive goods from a wreck &c

Whoever may happen to be owner as in case of insurance where the owners abandon he is an agent for the insurers — this is contrary to the C.L. rule

The master by the Law Merchant is answerable for all damages that accrue from his own default as sailing in tempestuous weather or sails without a pilot & damage ensues —

The goods are a security for the freight this is a lien upon them — & the freight is due at the port of delivery —

The owner is answerable as well as the master. It has however been questioned whether the owner would be liable for damage ensuing in unlawful trade — It has however been settled that he is, if the trade in a foreign country is such as would be contrary to the laws at home —

But the owner is not answerable for damage that arises from deviation if the master has hired the vessel who is then owner pro hac vice; and is an exception to the general rule

Question in Ct. whether the owner of the ship was liable for the deviation of the master. 2 Ca. Ct. 239. decided not. not being an option wrongs for wh. he is liable. —

It is primary sec. is a capital offence. by gen. Mil. pirates are to be tried by Adm. Ct. without agency. but in Eg. & U.S. they are to be tried by Jury by the Constitution.

In all ca. in wh. the Mar. refuses to assist to save the ship. or absents himself at the time of sailing he loses the wages that have not been p. Vern

2 Vern. 275.

If the ship is lost in the outward passage. seamen lose their wages. the Merch. his goods & the owner the ship. if on the return. the sailors get their wages for the outward passage! Id. 179 and any agreement of the sailors will not make the master free from the liability to pay them those if they insist on it. 2 Vern. 727.

3 Burr. 1884
1885.

Mariners –

If a sailor is quarrelsome turbulent & he may be put out of the ship among civilized people on being paid half his wages. but he forfeits all the property he has on board. & the rest of his wages. If however he goes so far as to use weapons he may be imprisoned & brought home to be tried. I do not know the punishment only that all the wages are forfeited. –

If he is discovered to write a conspiracy for a mischievous purpose to drive the capt. from his assigned course i. then the punishment is death. if the object is carried. This have been cases in which it was absolutely necessary to confine the capt. as when he was drunk &c. –

The mariners, when enlisted the only for going such & such voyages – they cannot leave the ship until she is unladen & taking down, & if there are three or carries or carmen they must act as such but are paid for this last mentioned service. 2 Vern. 727

Their wages are due at the port of delivery and if the ship is lost they loose their wages. this is to make them take care. 2 Vern 278.

As to what constitutes the port of delivery for the purpose there has been some question but it is now settled. to be where the cargo is to be left. (not at the first port touched at or actually is left). –

What comes within the scope of this business is to be determined by the usage of the country. A country firm do not usually trade in bonds &c.

Partnership. Two or more persons enter into partnership in trade & go by some proper name — Now either partner can bind the firm as far as the business of the firm extends — as the purchase of goods &c that go to the use of the firm. — A Firm in a city in more grocerys is different in its activity of trade from any country merchants. — The rule proceeds upon the implied authority & one can bind the whole in the business of the firm. —

But we are not to understand that if the property purchased is for the private use of the one who bot. it & known to be so by the seller that the firm would be holden. The presumption at first is that the firm is bound but if this circumstance of secrecy should appear ~~which~~ must be proved by the firm — the individual only is holden ~~that~~ he is presumed to know in what articles the mick. trade —

e.g. suppose one of the firm buys property for the use of the firm & signs only his own name the firm is held by it. & may be sued on it. stating the facts in the declaration & this even if the seller did not know of the existing partnership. —

The partners enter into an illegal trade as to cheat the revenue — & promise the payment to a smuggler — if one pays with the usual

(Mr) For although they are secret partners it is the agreement made between them that they will share the profits & bear the loss of the trade together which makes them partners.

Doug. 356. 371
3 P. Wms 402
1 Atk. Bl. 372
3 L. Rep. 998

It is a mere technical diff.y that prevents being sued together. viz. cant arrest the body of Ex.r nor have a bill of costs ag.t him by him. — On these reasons the law is bounded & the prof.t gen.l gen.l into survivors hands originally they were joined, but not now.

1 Salk 444

Over that. that survivor might join an indep.t debt of his own in a det.r for an indep. debt. but it is now given up. —

3 T. Rep 433:5
1 Show. 183, 188
190

edge & consent of the others the firm can be forced to pay him. — if not with their knowledge he must lose it, if they are not willing to pay him. The smuggler in this case could not recover by law. It is not necessary in order to constitute a partnership & to make the partners liable, that they all be known as partners. (b) Suppose a man offers his name to be joined to others to give credit to the firm without sharing the profits he is liable.

Merchts in Co. are tenants in common of this property & there is no jus accrescendi. tho the same proceedings at C.L. would make them joint tenants. If one dies the partnership is dissolved & his Exors. owns an undivided moiety as the testator did & may give receipts & sell property — Nothing survives to the survivor but the rights of suing & being sued. The Exors & survivor are to account to each other. The survivor has a right to all the books notwithstanding. It was formerly the idea that they must be joined in the suit, but it is not so now. for the in common in order of making an execution as it would go against the body of one & the goods of the other.

If the partners estate are solvent their partnership & personal property are both liable for the partnership debts. the debtor is not confined to the partnership property only.

If it is insolvent the partnership is dissolved & all the partnership property is liable: — You may come upon the company property for a private debt of a partner but debts you cannot take the other partners property — Infer to the insolvency of one partner that is as an individual. The mode of one one going thro business is ~~with an eye~~ by levying upon double the amount & sell it & return half to the other partner: this has been complained of as obliging a man to sell his property against his will. — & scab could not be supported now this practice —

The most common way is to sell an undivided moiety of the article so that the purchaser & the other partner are thus joint owners. But in bound The objection to this is that the property does not sell as well when the purchaser is bound to hold with another.

There is another way which is always the best when it can be executed which is to divide the property levied on & deliver half to the partner & sell the other half —

The principle you see is the same in all, to pay the debt & not injure the partners property.

There is no necessity that either partner should be insolvent to bring these rules into operation & where they are not the levy only dissolves the partnership as to the particular article —

On the mode of settling insolvent partners &c. &c.

They apply for the benefit of the act, the partnership property pays the company debts & the private the private debts. If any thing remains after the payment of the private debts of one of the partners debts – that goes to increase the dividend on the partnership debts. – If any thing remains after the payment of the company debts it is to be divided between the partners. –

Cases drawn by Judge Reese to exemplify these rules.

1st The Company of A & B. owes $2000. & the company property amounts to 1000. A's private debts are 500 & his private property 1000. he is solvent & has $500 left to go to the Co. creditors. B's private property is 1000 & his debts 500 B is solvent & 500 go to the Co. creditors this makes the Co. solvent.

2d. The Co. owes 2000. the Co. property is 1000. A owes 500 his private property is 1000. A is solvent & 500 go to the creditors of the Co. B owes 1000 & his private property is 500. B is insolvent & his private creditors receive 10/ on the pound, The Co. is insolvent & the Co. creditors receive 15/ on the pound. A has paid 250 more than B. which B owes to A. –

3d The Co. property is 2000 & the debts of the Co. 1000 A's private property is 1000 his debts 500. B's private property is 1000 his debts 2000. A & B the Co. is solvent. the

and the course by bill is usually followed by most of the States that have a bn. of bh.g. in imitation the form of bo Lit. 187 agency: & ag.s are only mates no diff.ce

2 Vez 465

creditors are paid & 1000 are left to be divided between A & B. So that A's property is now 1500 he is solvent & is really worth 1000. B's private property is 1500 but his private debts being 2000 he is insolvent & his creditors receive 15/ on the pound —

It is very important that these rules should be understood for the occasions in which they are applicable grow more & more frequent in our country. — Beames Ess. Mise. Part

I have mentioned that the act lies agt. the surviving partner. he is a bankrupt. but the Exr. of the deceased is rich — The suit is brt. agt. the survivor & the Exr. lays the foundation of a bill of Chy. to recover satisfaction of the Exr. this is Eng practice & was ours, but in Ct. now. we bring an action directly agt. the Exr. at law founded on the judgt. stating it to be inoperative. — There is a practice among merchants carrying on business extensively, to agree to share profits but not losses. but they are liable for each other's debts. 1 P Wms. 682. 2 Atk. Bl. 247

Of the rights Partners have agt. each other. — A & B are Partners & at the dissolution. B has the most of the partnership property. how should A get relief — formerly in Eng. the only remedy was by acct. of acct. & the books were referred to auditors & they settled, but

If one of the partners had turned the property into money it may said that indebt.. asp.. would be the remedy but it is not so for you have to examine all the acc.. which cannot be done in this a.. This act.. would lie if the parts 2 T. Rep. 478
may had sep... the their acc.. & found so much due &c.—

1 Salk 292
3 L. R. 993
Cowp. 449.

1 Ken. Bl. 45-8
2 T. Rep. 705
727.

it happened that the number of partners increased this method would be an endless job. but now the usual method is by bill in Ch^y. which settled it by commissioners, they all the documents and papers may be ordered in. which could not be done at law. besides it would take a jury a whole time.— If however there were but two partners an action at law might answer which is the com^n practice commonly. the a bill in Ch^y. would prob^y. lie. I see no room for an act^n of indeb^t. aff^t. to lie by one partner ag^t another except for a liquidated balance — for in this act you cannot go into all the acc^ts. between the partners.—

It is a common thing for one partner to be authorized to settle all the acc^ts. of the partnership customers when the partnership is dissolved — It has been questioned whether this one could bind the co. in a note signed by him in their name. but it has been decided that he cannot. he must pay the money or sign his own name and call on the other partners.— because the partnership is dissolved.

Whether private partners can be sued was formerly but it is now settled that they can be sued to the credit of one only.— In order that partners may avail themselves of the dissolution they must give notice of it.

To if the goods are perishable they may be forthwith sold
on credit.

If you can show the man knew of the dissolution it is enough — & also if the dissolution was a matter of notoriety, where he is presumed to know. In this kind notice was published in a daily paper six weeks that the Plff took — it was notice. Another case was it was published in a paper that he did not take, but it had been published a long time the Ct determined that he did not know. — 1 Salk. 292. Bl. Rep. 993. Comp 449. so that it depends upon the particular circumstances of the case. Thus when the man was proved to have access to the news papers at the Coffehouse where several papers were rec'd which contained the notice. —

Factorage. —

A factor & a broker are very much alike the first is employed in a foreign country from a commission from a merch.t, running thus "to buy & sell property as if it was your own" — this gives power to sell on credit & in case of loss the factor loses nothing if he acts without negligence — 1 Burl. 103. Yelv. 202

Sometimes the commission runs thus "to sell & dispose" these words give no power to sell on credit & if loss ensues in consequence, the factor loses. 2 Mod. 100. 10 Mod 144 Moloy. 493. (this com.n is special) & acts as a

As between the merch.t & factor this is all right & he must pay them.

Stra. 1178
1182.

2 Vern. 638

factor to B & C separate merchts. under a general commission to sell goods on credit. he sells property to a man who fails. B & C must divide all that A gets as a dividend in proportion to the amt. of sales

All that is required of a factor is integrity. Co. Lit. 89. Malory 295. & to use ordinary diligence

Suppose a factor whose duty it is to pay the duty — thinking he can run the goods safely — runs them. — & then charges all the duties to the merchts. — The factor runs all their ships of value & soon run on as to his life. the Merchts must pay. Law. 9 v. 265. Bac. Abg. Tit "Factors"

The factors sale binds the principal, & yet the factor cannot use the property altogether as if it was his own for he cannot pledge that for his own debts. this supposes the factor known as such but if the property is held up as his own property — it is so in relation to all but the real owner.

A letter of commission gives no power to sell upon credit, yet if he sells the merchants get a good title. tho the factor may lose & there is a singular feature in the laws of factorage viz. that if the factor gives more than his commission warrants or exceeds his

Cowp. 253

Dunn. 489.
1 Vez. 509

2 Vez. 39

* Because if he had sold the goods of ~~two diff.~~ merchants in the way the money rec.d is said to have been divided —

2 Vez. 39

commission he forfeits his wages.—

If the mercht. is fraudulent that the factor will fail & gives notice that no payment are to be made to him, if money is paid to him it must be paid again to the merchts. if it is known that he is a factor.—

The factor has a lien upon all the property in his hands not only on acct. of his commission but for any balance he may have against the principle.— Suppose the factor gives more than the commission warranted. the Mercht. is not bound to take them but if the Mercht. takes them he must pay the factor all he gave for them.

If factor sells his own goods & those of the mercht. to the same man, (bottomry) this may become a bankrupt. but some money is recovered — the factor must pay the mercht. in full before he takes anything on his debt.— This seems not equitable but it is a principle of policy to make factors careful.

There is a practice singular the usual — the merchts. writes to the factor to insure his goods this he is bound to do & if he does not he is considered as the insurer.— (those who lie agt. him for the policy)

When a factor dies all the goods that can be identified goes to the principle
1 Salk. 160

If the property cannot be distinguished it is part of the factors estate and is subject to the debts in favour of the principal. — Comp. 295.

Qu. acts for other persons but the contract is made with him & the suit is brt. in his own name. — 2ly. Qu. whether if acct. is ordered to state off a certain price (Comp. 395) & not more, he should strike the offender he is liable. decided not. —

With respect to auctioneers it has been long a question whether if a man is employed to bid off goods at a certain price set by the auct. he can have them or the highest bidder. the court decided it to go to the highest bidder. Rightly I think. Where a man makes a bargain at C.L. it is the man to whom it is sold: get by the mercantile law the seller may stop these goods in transitu if the buyer is discovered to be a bankrt. If, to be sure, it has got to its destination or is assigned bona fide it cannot be stopped

Bills of Exchange—

A bill of exchange is defined to be a request in an open letter from one man to another to pay to a man or his order, such an instrument as this ordinary person to whom the bill is payable the legal title - holding a payee or endorsee who can sue in his own name the drawer. Suppose the drawer does not except. he has not become an acceptor. then the holder has a right of action in his own name agt. the drawer drawer or endorser. Now this negotiation of a chose in action is contrary to the rules of C.L. for instance a bond is sold. it must be sued in the name of the original payee — suppose a man should sell a

1 H. Bl. 612. 6 Ves 332
1 Wils. 229. 1 Vy 411
3 P Wm. 129.

The indorsee ~~at~~ ~~b.f.~~ a bill would have the legal title but if a ~~bstate~~ of hand he would only have an equitable title & could only recover in Ch.

2 Bl. 1272
1 T Rp 20
3 T Rp 182
5 T Rp 683

§ that is the consideration of a specialty cannot be enquired into.

bond & covenant that the buyer should collect the money it would be in vain –

But at length bills interfered & protected the sale when done honestly or not to say. Now if a bond was sold & the promisor had notice if he pays to the seller bills will oblige the promisor to pay it over again. It must state however be sued in the name of the promisee – & if the promisor gets a release from him it would be good at law & then the buyer must apply to bills. The mercantile law is different. & the whole right & title is immediately vested in the buyer. If then a note negociable was sold the buyer could sue the drawer in his own name. N. J. Rep 763 & J Rep. 340. 1 J Rep. 621.

The consequence of the bill. not subjects the owner to great inconvenience. since the promisor may withdraw the suit give a release &c. but of bills compels the man who gets the discharge to pay the note where he ought to –

This principle of all mercantile law applies to policies of insurance. bills of lading & respondentia bonds but never to those instruments not of a mercantile nature –

another difference from bill contract. it is in the shape of a simple contract but has the qualities of a specialty this principle is extended to bills of exchange after

3 Salk 70
1 Bl. 445

* unless it was so contracted

B.N.P. 182

endorsement - but before that it may be proved that there was no consideration at a suit on it but if it is endorsed this cannot be done for it would destroy all confidence in dealing. The principle is different from that which prevents proof of this on specialty for in that you prevent from the notoriety of sealing that there was consideration & it must not be questioned but in relative to mercantile instruments it is to ensure confidence & afford facility to commerce.-

The matter of the bill is called the drawer the person in whose favour it is drawn is the payee & the person on whom it is drawn the drawee when he has accepted he is called the acceptor when the payee has endorsed it over to one he becomes endorser & the person to whom it is endorsed is endorsee.-

Whenever A draws a bill in favour of B upon C. the law presumes that C owes A & C's acceptance of it proves it. unless something destroys this presumption.-

There is no certain influence to be drawn that the drawee owed the payee - & suppose he did owe him this bill does not pay him. it has however this effect to operate as a waiver of the right of the payee to sue the

& if it is not accepted he may sue on the original debt or on the bill. — 1 H. Bl. 586 602.

Bankers notes are always payable to bearer other notes are so some times but not necessarily so. These pass by mere delivery. —

An infant may endorse & sue on a bill in his favour. Chit. 24 Ryd. 30. Bac. Inf. 1 6. & Except in the case of indorsement by fraud court. It seems that the drawer endorsed by, from incompetent, it will still be valid agt. as compound partiy. Chit 25. 6

1 T. Rep. 240.

drawer until it can be found whether the drawee accepts it.

Checks. There is a species of negotiable notes on bankers, under payable to bearer. Should not note upon them at present.

If a bill is drawn to the payee to make it negotiable it must be indorsed by the payee. — Bills are due always when the time is out. Bankers bills must be demanded before it can be sued. — A Bill of Ex. does not pay the debts that a banker bill does if you take it, it being money. When you see upon this you should see upon it the name of a bill of Ex.

Who can make bills of Ex.

It was thought that no one but merchants could. but the fact is that any person capable of contracting can make a bill of Ex.

Let me now I would say that gen.l (at C L) a minor is not bound by his contracts except for necessaries & there is no distinction between a specialty & a simple contract in mercantile — because you must go into the examination of the consideration of the instrument. for this reason he is not bound by a bill of Ex. after it is negotiated — before it is negotiated he is bound because you can then go

1 T. Rep 68

(a) and if it passes to E by delivery only it must even after pass by delivery.—

(c) for money had without consideration. – & then it might be recd back to the drawer. –

1 T. R. p 760

* which is an acceptance supra protest.

D. R. 1 980
Bcamp 83

into the consideration. If he arrives at age & upon in pay it. he is bound so that the bill is only voidable not void. —

A is the drawer. B. Payee C. the drawer. C accepts then he becomes acceptor. B endorsing to D who is endorsee — who can pass it to E by delivery. But B endorsed it in blank & delivered it to E & E to F & so on — the holder may fill up the endorsement of B & then sue B. but so one can be sued upon the bill but B or the drawer. but any of all those whose names are endorsed may be sued by the holder. If the bill has been passed by delivery the holder can sue the man from whom he rec'd it (C) but so other on this whose hands it has passed without endorsement. so that there must always be one endorsement to make a bill negotiable —

A man can make himself party to a bill without the knowledge of the drawer. as where a man accepts a bill to prevent dishonour of the drawer or endorser who are then holden to him. —

An endorsement may be made by an agent. he should endorse by his own name in behalf of his principal if he does not state the 'behalf' he becomes liable himself as endorser. —

It is not every request to pay money to one or his order that is a bill of Ex.

A bill may

2 Stra. 1291 (3 781)

Stra. 591.

There is one case directly to the point — Ld Hard. 25.

several requisites – It must be for money & not any other matter – it must be on personal credit & not payable out of a particular fund. which may not be productive. it may in this way be a good contract between the parties but is not a bill of Ex. Ld Ray. 1361. 3 Wils 317.
it could not be indorsed 10 Mod. 294. 316.
However it may appear payable out of a particular fund when it is not in fact – being only a description of that fund from which the drawer could reimburse himself. Ld Ray. 1481. 1525. It is said there is no instance of a note of hand

another quality indispensable to a bill of Ex is that it must be paid at all events & not depend upon any condition which may not happen. 2 Str 1191
3 Wils 213. Ld Ray 1362. 1396. 1563. 1 Bur. 323.
It is enough if it will one happen on the death of a man. or if the condition is morally certain as the paying off of a public ship – it is not good policy to doubt that the public ships will be p^d off
Bur. 217 Str 1217. In all these cases the contract as between the parties will be good but it will not be good as a negociable instrument.

as to the words "value rec^d" there are many obiter opinions that these words are not necessary*

Judge thinks the words "value rec'd." necessary if the instrument is sued before endorsement.—

Hand. 2d v. 358
2 Wils. 253.

So long as the bill before it is negotiated can be set aside by the illegality of the consid^n but its character is changed by negotiation and left, ~~the~~ purchaser ignorant of its illegality.—

I cannot conceive why a bill that has been once negociated should need the words "value rec'd." they are only evidence of consideration & the proof of that is sufficient by the endorsement.
It has been said that the word "order" is necessary but it has been decided in N York Mass. & Conn. that those words did not necessary to make the note or bill negotiable. Chitty recommends that the words value received be always used.

When the consid.n is an illegal one the law Mercantile as it regards negotiated is diff.t from C.L. for when a bill of Ex is negociated the consideration can not be questioned.— The Mercantile law allows it in some cases — C.L always: for by C.L. if the consideration of a bond is illegal it destroys the bond even the hands of a bona fide purchaser as well as of the obligor — the maxim is that whatever equity the assignor had the holder will have by C.L.

In mercantile law this is allowed to destroy the bill in some case — if a bill is on bad consid.n it is bad in the hands of the payee but if the payee negociates it. if the holder knew of the illegality it would be void in his hands. if he did not it would be good against the drawer if it does not come within that description of instruments which by stat are void to all intents & purposes

1 Bl. 445
Espel P. 166
6 T. Rep 61

x) It being considered as a loan of 100. tho 5 be deducted. - this rule however applies only to negociable instruments & not to bonds. 6 Lit. 73. 3 Bos & P. 154. 8.

" not so as to stamp on bills — or as to wills. —

If the apignor knew of the illegality of the contract in the instrument is void & whether he knew or not it will be void if it comes within the statute as of usury or gaming — If anything is void it can never be ratified. Stra. 1155. Doug. 736. 1 H. Bl. 469.

It has been much litigated whether it is usury to receive the interest at the time of lending — it has been determined not to be by the customs of bankers & brokers. — It is plainly taking more than the legal Int. 2 Bl. Rep 792. 3 Wils 256. 2 T Rep 52 —

It has become a practice to draw bills payable to a fictitious person and then endorse it in the name of the fictitious payee — Courts have now determined that it is the same thing as if made payable to bearer in which case no endorsement is needed. —

"The genl. rule of law as to the validity of this instr. is that an instrument must be good according to the law of the country where the instrument is made 2 Stra. 733. However the time of payt. is regulated by the law of the country where it is to be paid. As there are different number of days of grace in different countries. —

Usance is a term used in bills it means the time which it is the usage of the countries between which the bills are drawn to appoint for payt. of them. 6 Mod. 192

The requisites of the Instr.

Beaum. 454
Coach. 572
Mason v. Mount Bay

of the country where the bill is made gives it validity the time of payt is regulated by the laws of the country where it is payable.—

State of the Parties & their obligation to each other.— Of the Acceptor. the same obligations lie upon the drawer of a note & the acceptor of a bill.

The acceptance of a bill is an engagement to pay the bill to any man that has it, & not particularly to the presentor. 1 Atk 715. Burrow 466. 3 Burr. 1663.

A man who previously engages to accept a bill, has accepted it & may be so declared agt. it is no matter whether presented before or after the time of payt. if it is accepted 3 Atk P. 290. Hardw. 74. Strn. 1000

An acceptance may be by writing or parol & is good both ways tho the common way is by writing. the acceptance is not a promise to pay the debt of another. Str 618. 3 Burr. 1674. 1563. but his own debt.—

This acceptance is not necessary to be made to the holder it may be accepted to the drawer—

Now a bill may be accepted in part so as to hold the acceptor – the holder is not bound to accept that but he may if he chooses – it is no harm to the drawer it pays his debt in part. so he may except if he phrases a promise of pay.t at a future day. this you will remember is at the option of the holder. Str. a 1/14. 11 Mod. 190. Bacon L 81–

There may be also a conditional acceptance as if such an assignment arrives & if the condition happens it is bound 2 Wils. 9 Cowp 574.

What is an acceptance? any thing that is said or written that does not amount to a refusal is an acceptance as writing the word "seen" or a direction to serve one to pay it Str. 648. Gil Ev 618

An acceptance is an engagement to pay the holder or any indorser who pays it & he may bring his action for it ag.t any of the previous indorsers by excising the intermediate indorsers – the reason may be seen at bar.

The acceptor renders himself liable to the drawer. as if on the bills not being paid the drawer is sued. & he pays it. he can then come upon the acceptor & sue him if the drawer had effects in the hands of the acceptor to pay it. but if the acceptor can show that he had not. he will succeed

himself. the law presumes that he had effects.

If the bill is payable to bearer it may be transferred by delivery; but if to order it must be endorsed. — The drawer & all the endorsers are liable to the holder & so is the acceptor after acceptance endorsements are usually in blank. 1 Ld Ray 575 3 T. Rep. 80. Doug. 611. 633. 551.

This bill when drawn & presented is dishonoured unless accepted within 24 hours. There is an implied ag.t on the part of the drawer that the drawee shall be found. this does not mean that he shall not have moved or gone on a journey &c he must be looked up. but if he has absconded or never lived there the bill is dishonoured. — It may be accepted by an authorized agent as one who is accustomed to do such business. —

An acceptance is irrevocable by the gen.l rule of Law Merch.t the holder however may waive the acceptance if he chooses. Doug. 247 as when the holder found the drawee had no effects in drawers hands & the endorser able to pay. There was a case much litigated where the acceptor had paid a part & got a longer time to pay the remainder. the question was whether this discharged the acceptor. the court held it to be a discharge only as to that time. —

Whenever a bill or note passes by delivery to the party receiving it is a stranger to the bill, if not a certificate, he cannot by the law much: maintain an action against any of the parties to the bill but by C.L. he may sue the man who transferred it to him. — But if it were a certificate the holder might sue the indorsor.

1 Show. 165
1 Salk 128 & 130
Ld Ray. 871

Of indorser. A drew a bill upon C payable to B who presented it. C would not accept it he cannot maintain his actn. agt. any of the parties by law. Mem. A bill was drawn in favour of B who C & D indorsed to D & D to E in blank. this bill may be filled up by indorser for two purposes to vest himself the property or with a power & authority to collect it which, Mr Tattle says destroys its negociability.

And the case. C accepted the bill before the time of payment. B an indorser presented it for payt. & C put the bill in his pocket without payt. B brot. his actn. of trover. the objection was that B had parted with his property by the blank indorsement to C. but this was nowise certain. for it might have been given to C to collect & the ct. sustained the actn.

When the drawer draws this bill & delivers it over there was an implied contract to pay the bill not only to B but to his order or to any indorser or his order. The common way is to indorse in blank one after the other. — All previous indorsers are liable to the last. — the indorsee then holds the bill with all the security that the payee did & as much more as the credit of intermediate indorsers.

Suppose the payee has rcd. a valuable consideration from the indorser to

endorsement cannot be filled up so as to destroy the negotiability of the instrument. but if the holder is a mere agent it may be filled up in any manner.

Where a drawer or bill it must be drawn payable to B or order & it has been questioned whether it is necessary to put in the word or order, in the indorsement but the court held that it did not as the word order originally used was sufficient.

Where the transfer is by delivery, the bona fide holder has a right to recover against the drawer tho it has intermediately been obtained by fraud or theft. As when a bill payable to bearer was taken by Robbery from the mail, it was said that the drawer was not bound to pay it because the thief came to it without consideration but the court held otherwise. if we reason from priority & say that the thief could convey no title, the drawer has the prior title the true reason is the same as that by which money is governed by the rules of L.L. 1 Bur. 452. 471. 1 Bl. Rep. 485. Peacock vs Rose in Doug.

Two or more partners can point payees of a bill. an indorsement by one will bind both. but when the bill is made payable to two who are not partners in trade the indorsement of one will not bind the other. so that both must indorse; it was a question much

Gitta. 516

Beam 469

3 Will 1

Carth 5.166

2 Show 509

Beam 266

This is often done and the money is usually paid in such cases
but if it is not it seems to be a bill of exchange.—

litigated. that is now at an end — It was said that the payees were good for a partner in trade. but it was overruled. Doug. 2 Ed. App.

In two states N York & Mass it was said that they both were bound because they held themselves out as partners — It is still a question vexata.

There are some persons incapacitated by law to endorse as the husband of a feme sole who was made p.e. yee — so the assignee of a Bankrupt. so Ex.r & Ad.r a trustee. & minor &c. —

A bill cannot be divided by partial endorsements so as to make the drawer liable in more actions than one. — as if 500 to A. 500 B &c. nor it can be endorsed so as to subject the acceptor except in one suit unless he accepts it after these divisions are made. — Stra. 516.

The different kinds of bills, a bill may be made payable "to B or bearer." "to bearer." "to B or order" — as to the first "to B or bearer" — the property passes by endorsm.t or delivery — When "to bearer" it passes by delivery — when "to B or order" there must be an endorsm.t and after that it passes by delivery or subsequent endorsement of the holder. B. passes it to D, by endorsm.t in blank when it becomes a negociable instrument Peacock v Rose Doug. 1 Am Bl. 606. Now the effect of B's name in blank is to convey the property to D or

to give D a power of Atty to collect it. & there is no certainty which under it is filled up or passed for a valuable consideration. — something must be done with the bill to determine what is meant by the blank indorsm.t. If D does fill it up in the name of himself the action must be brot. in the name of D. If it remains blank the name of B may be struck out & the action then brot. in B's name. —

After indorsement it passes by delivery any future holder may fill up the blank endorsem.t of B to himself as if it had been originally indorsed to him: suppose there were half a dozen blank indorsm.ts & it was in the hand of G. he may strike out all the intermediate indorsm.ts & sue B. the indorsm.t of B being filled up to him. — let there be every so many blank or special endorsements the holder may strike out all the endorsements till he comes to a blank indorsm.t & sue that indorser. & to save a multiplicity of suits when one would do as well. — So long as there is a blank indorsm.t so long it passes by delivery. that its negociability may at any time be restricted by filling up the indorsm.t with power of Atty. as to pay E for my use. — or take this bill & give credit for it.

Just Rose

some one indorses who has nothing to do with the bill, is a stranger to it to give credit to it. this is a different thing, the import of which is an assurity that the bill is then due & will be paid if due diligence is used. the only defence for such indorser agn.t the ass.t bro.t on the warranty is to show that due diligence has not been used to collect it.

Engagements of the several parties.

Of the Drawer – He as merest engages, as if he had specified it, to pay the payee if the drawee is not capable of binding himself – 2 that the drawee is to be found 3 that the drawee will accept it & 4 that he will pay it when it becomes due & that he will all hold himself under the same obligations to all that hold under your order. but not to all who come in posn. by delivery who cannot sue a party to the bill by Mr. L. but by C L he can the man from he received it. –

In case of non acceptance he is liable for not only for the contents of the bill but for certain damages – this is by the law merchant. all that you recover by C. L. is interest in a note of hand. if A in an contract to build a ship the damages may be very great.

at first in notes or bills damages were inquired into; at length certain damages were settled by the custom of the merchants. – before the revo-

A man may render himself liable as drawer without actually drawing the bill or by writing his name on a paper & delivering it to be filled up by another... 1 H. Bl. 313

2 Show. 441. 494.
3 Mod. 86

lution in our country the damages were 2 of cent besides the interest. Now they are different in the different states. in N York 20. In Boston 10. This is to be learnt as other customs are.—

It was not long since that this question has been settled. whether a drawer could be sued upon the refusal of the drawee to accept. you must demand twice. — Stra. 949. Chitford vs Mayor Doug
It was decided in Ben & Penn. that it could be.
There is another case of some difficulty. the drawer covenants that the drawee is to be found. if he is found after returning from a journey or moved & it is accepted as soon as possible the bill is is not dishonoured: each case depending on its own circumstances.—

Of the Endorsers engagements.—

The engagement of the endorser is the same as that of the drawer to all subsequent holders — our endorser is a new drawer of the bill & nothing will discharge him that will not discharge the drawer.

There are certain things that will discharge him at C. L. that will not at the M. L. Our inferior court has the same effect at C. L. & M. L. & if you do not get

2 Bl. Rep. 1235

an ineffectual judg.t ag.t one in tort discharges at b L th others but not so in contract but even in contract when there is an Ex.t by b L or discharge to one is good for all.—

1 T Rep. 717

1 T Rep. 170

the money out of your way over the other. But an irrefutable Ev.n by C.L. does this at L.M. it does not. or if the debtor is taken and imprisoned & then released the right of action a joint debtor is at an end by C.L. for the maxim is that the discharge of one is a discharge of the other — originally meaning a discharge by pay.n But by M.L. you may over & imprison all hands till you get pay. It is strange the law is not the same law is not applicable to both.—

The holder of the bill thus is entitled to recover but there is something for him to do. He must present in proper time & manner, not let it lie too long. nor neglect to give notice.

If the bill bearer draw at a certain time after sight he must show it to the drawer within a reasonable time for the drawer may become insolvent or the drawer get his effects out of his hands.—

If the bill is payable at a certain time after date if the payee or indorsee shews it to him at the time of payment he has done his duty. I do not consider this as settled for it is grumbled at. It is said it ought to be so settled before

Where it is presented in proper time & it is dishonoured he must give notice to all that he intends to make liable. & those are not liable

And there are contrary decisions as to whether he must give us proper notice that he looks to them for pay. —

1 T.R. 410

1 Ld Ray 743
Str. 829. 441
5 15. 649

The notice would be good tho not given by this method if given in a reasonable time. and the rule as to inland bills generally

who do not have notice. the drawer must have notice that he may adjust his acct. with the drawer - but if he had no property in the hands of the drawer he need not have notice. The endorsers must have notice that they may secure their remedy in season if there should be a failure. 5 Bur. 2670. 1 T Rep. 712. Stra. 442. 2 Bur 669.

Now the drawer may accept a bill varying from the tenor of it; as to a longer time of pay.t by which the Drawer is bound. the holder must give notice of this fact. viz the variance.

The holder must present within the time of pay.t for acceptance & there again at the pay day. The law states persons he will pay at. Beawes 261. 761. 2 Bl. Rep. 742.

The time of notice for all foreign bills must be given by the first post after the refusal to accept & also after the refusal to pay when presented on pay day. If there is no post; it must be given by the first opportunity. 1 T Rep 169. 67.

The question as to what is diligence & what is negligence is to be referred up to the jury by the court

15 Ref 170
3 Bac. 514

and if the same notice be given of the dishonour of an inland bill as is required for a foreign it gives the same extra days. & by this the power of giving the same notice is granted. —

As to the manner of giving notice

a bill inland bills require no particular form of giving notice it only requires notice in a reasonable time. & the same rule applies to a promissory note — What is a reasonable time is a question of law arising on the facts — As to the requisition of notice in case of the dishonour of these two bills they are made liable by an Eng. Stat. —

But of foreign bills the form is specified & the method must be followed as the holder loses his security —

Where the drawee refuses to accept the holder must go to a notary public or some publicous reputable person if there is no notary, who goes & draws inside & then sets down on the bill the time circumstances &c called minuting & writes down the dec.n of all the facts & signs it officially, this is called a protest — all this is to be done in the usual hours of business — This protest is then sent away to give notice by the next mail a copy of it being preserved by the hol. & the notary having certified it which is evidence — Where the time of pay.t comes the same process is gone over — then the bill itself is sent to the drawer & the copy taken by the notary is the evidence in the suit So too if the drawee is incapable not to be found or if he accepts the bill warrants from its terms

as to accept collateral articles in lieu of money if the holder receives such acceptance it is at his own risque. —

It is usual for drawer to write to the man upon whom credit is drawn & if he agrees to it all is well.

the same process is pursued unless indeed the holder will accept such a warranty acceptance when he is bound by it.—

When the holder perceives after the acceptance & before pay day that the acceptor will fail, the holder is compelled to demand security — the law takes this case of the drawer & indorsers & a protest must be entered if the drawer does not give it.—

Of the effect of notice — The holder if he has complied with the legal requisitions he is entitled to all his damages — by C. L. no one recovers more than the interest by way of damages — but by all L. he can. —

At first the holder recovered all he had suffered but this being abused with inconvenience the amount fixed at was fixed by custom. There is a bill now before Con. to make the damages uniform throughout the U.S.

There is a species of bills drawn on one upon the credit of a third person. As by A in favour of C upon B on the acct. of D. In this case there is no contract between the Drawer & drawee — there is no presumption of the effects of A in the hands of B. — B is bound if he accepts — anyone may accept it for the honour of the drawer & the holder acceptor must get the bill protested in all cases

of this kind — & this raises the contract between the drawer & acceptor.

When it is thus protested for non acceptance he must give no notice or protest it for non pay.t if the drawee having notice of the first protest shews himself pleased with the acceptance.

If the drawer has no effects in the hands of the drawee & the bill is paid the drawer has a right of action agi.t the drawer at C. Langas. I suppose —

It is agreed rule of all. L that an acceptance cannot be revoked altho the drawer is likely to fail or he has accepted without consideration

In the mercantile law there are a great many cases in which a man is bound in contract where there is no consideration. & the reason is that there are third persons concerned — but by C. L. if there is no consideration the contract is not binding — & even by all. L. if no third person is concerned a contract without consideration will not bind — so there a medium factorum is a thing known to all. L.

The holder of a bill may discharge the acceptance by writing or parol & he will be bound by it. even tho there were no possible consideration for the unless indeed in the wish to oblige the drawee —

Doug. 237

Stra. 733

247
Doug. 235

* The acceptor is holden untill the stat of limitations runs
acg.t the contract.

2 d Ray
734
1 Wil. 48

so when the holder discharged the acceptor drawer from a suit he had commenced against him in consequence of a bond from the drawer. the drawer proved insolvent & the holder succeeded.

No indulgence unless it amounts to a dec^n that the holder will not look to the acceptor will release him even when the holder looked to the drawer for payment & received part of Lim a which this does not discharge the acceptor" — neither does a recept of part of the money from the drawer making or indorser except pro tanto —

If due notice is not given to the acceptor of the reception of the money from the drawer & any injury comes to him thereby as by paying into other hands he is discharged.

It was once thought that the holder was first to resort to drawer but that is done away Strac. 441. 2 Burr. 669. this is fully settled by the case in Burrow.

No length of time short of the Stat of Lim. discharges the acceptor of a bill. Suppose after acceptance the holder applies to the drawer & gets his obligation for the money this does not release the acceptor it only adds to the security of the holder —

When the acceptance is variant

the holder may recover the amount against the acceptor & the Drawer is liable for the not if the bill be regularly protested. When the holder has indulged the acceptor & let it lie along without giving notice of non payment. he cannot recover against

If the drawer or indorser promises to pay he will be liable — altho he has no consideration. if there is a moral obligation to pay it he ought to pay it, if not he ought not to be obliged to. so it seems to me that this principle is questionable & there are different decisions. this is a bad promise.

The Ch. however has said that if the promise is made under the idea that he would otherwise be bound he is not obliged to be bound by it Cowp. 102 note. I should suppose that if the drawer had left nothing he would be forced to pay it. the moral obligation being the criterion.

There is a species of notes called bank notes, drafts on bankers &c. Bank notes are money and pass by that name in wills &c. & where the stat. uses cash it includes bank notes. — The Ch. has said that if the payee does not object because they are bank notes & not gold & silver it shall be a tender. —

Bankers notes are called cash as are checks

1 Stra. 415

1 Stra 516

Stra

and so pap. the demand must be made within a reasonable time — That was decided to be 24 hours after it has been rec'd. in London A case: a note was taken at 2 o'clock & the holder demanded pay^t. at 9 o'clock next day. the court said that as the banker had failed the holder would not lose the — another case was the holder left the note within 24 hours & then called after 24 to take the money whereto been the had failed the b^k. said he had not been negligent. — Another case in Str. 550 the last decision was questioned. —

Another case was where the holder called early enough

Another case was the bill was rec'd. after dinner & presented within 24 hours. no loss ff. a. 1240. Another case where more than 24 had elapsed it was said a loss in Bean 480. a case of the same kind the court charged the jury to find a loss. they did not & the b^k. granted a new trial.

There was a case where the parties to a bill of Ex lived near each other. it was not considered as governed by the same rule as other bills. bcl notice was said to be enough.

Usance is a term denoting a certain length of time and formerly much used see Kid 4. In Eng & US & all the Eng. Col. it means a month: a calendar month & not as C. L. month which are lunar or 4 weeks

Days of grace are the time given beyond the time of pay^t in Eng & US. they are three as they are in most of the mercantile courts —

By all L. if the pay^t day falls on sunday pay^t is to be made on saturday by C. L. on monday.

There has been much dispute as to words from the day & from the day of the date. it was decided at first at C.L. that from the d is included & from the day of the date included the day of the date —

But by a decision Comp. it has been determined that the words are nearly synonymous. — & Ld Mansfield says it must go according to the apparent intention of the parties. — An estate was given for life to commence from the day of the date as a freehold could not commence in futuro. the words were held to include the day. — But in all L there has been no difficulty for by both interpretations the days always was & still is meant to be included.

"Are the a Statute makes them negociable."

When a bill is payable at sight there are no days of grace. — tho' it would seem they were more necessary here than in any circumstances — but this is the law. —

If a note was given payable to B or order it was questionable whether such a note was negociable — the St. of Ohio made it so. It was before the act a disputable question & is really in favour of this construction of the Act since the Par. tho'. this the correct interpretation of it. — This stat has been copied by nearly all the States of Union. & it is quite understood that where there is no such Stat. that they are not negociable. — Chipman Judge of Vt. has settled to my mind however the other way. He says that the note is a promise to pay to the person & to all to whom he shall order pay.

The drawer of a bill of Ex. & of a note of hand are different characters & by confounding them there is much confusion. The law that applies to the acceptor of a bill of Ex. applies equally to the maker of a note.

Previous to a Stat of Ohio. Corporations used to draw & accept bills by their agents not by that Stat. they are prohibited. There is no such Stat with us —

1 Show. 8
10 Mod. 286

1 Bl. Rep. 485
3 Burr. 1516

Bram. 481

A bill in favour of the order of B is the same thing as a bill in favour of B or order & the declaration on both is the same

A bill payable to bearer passes by delivery and it may be endorsed & the indorser makes himself party – if it is not endorsed or accepted no one is liable but the drawer.

A gives a note whereby he promises to acct. with B or order to account for $50 this means & is understood as a promise to pay

A promise to accept to the drawer is an acceptance & if the drawee will not pay it may be protested for non payt. & a suit brot. on agt. the acceptor now it is said in some cases there is no consideration but the rule is that if a third person may be a loser not that he actually is. The person is bound by his promise according to Ell. L. & there is no medium practice in Ell. L. where a third person is concerned. Mason vs Hunt Doug.

I have observed that a man may accept a bill warrant from the tenor of it. if he does he is holden by it. & when you sue the acceptor the Dct. may be that it was an acceptance according to the tenor of it. A case was that the holder attached Ban. to Mch in the bill as the same accepted.

in by C.L. was forgery & would have discharged the bill but by all L. the drawer was bound.—

It was once questioned whether if a man wrote his name in blank & gave it to a person to fill up it was a good note. but in Langstaffs case it was held good. Doug. —

A drew a bill in favour of B upon C. B endorsed it to D. C. put it in his pocket. if D loses it, it will sustain an action of trover. but B brs. the action & used D as a witness the endorst. being in blank & recovered:— for the property had not passed

Bills payable to bearer or to A or bearer are transferred by delivery & are as fully the property of the holder as if he held by endorsmt. — The law presumes effects in the hands of the drawee. — If the payee is a creditor of the drawer, the bill is no payt & if the bill is lost without negligence the drawer must give another, or owes the payee the money as much as he ever did —

Negociable promissory notes are put up on the same footing as bills of Exchange Lawsp. 9. 17.

Inland bills of Ex are not governed by L. Mer. & were not in the case Eng that was under.

Where you give

common notice you recover damages as at C. L. if such Notice as is required by Foreign bills you recover extra damages

In U.S. the rule generally is that bills inland as to one State are governed by C. L. but if drawn upon another state they are treated as foreign bills.—

The last convenient part of the day of pay.t is the time to make a tender & if made in the morning if he is not at home it is no tender. whereas if made at the last convenient p.t it is —

By C.L. any time in business hours is good. tho the earliest time of business on that day is sufficient for a tender & protest.—

Of the Remedies—

This brings up to view the Whole law on this subject.— When there is a privity between the parties the suit may be brot. at C. L. as B may sue A. & if B indorses over to D. D may bring his act.n at C. L. ag.t B. but not A. now if D passes it by delivery to E. E cannot sue any body by L. M. but by C L he can sue D & him only.

The custom of Merchts. is not such a custom as of that of London — it is as much the law of the land as the C.L. is — "the Court are presumed to know it."

Suppose the indorsee was about to sue at the drawer. the old method was to state the custom that if one draws on another who does not accept the drawee became liable. stating it at length & then it states the facts of the particular case showing the circumstances by means whereof the drawer became liable & the course was the same if the suit was brot. agt. the acceptor. — But this method is now at an end — They only now allude to the custom but not as formerly to give the provisions in detail but saying only that A according to custom of Merchts drew a bill. in favour of B upon C that B presented the bill & C refused to pay it whereby he is damnified so much & need not state that he had effects in his hands this the law presumes. but if the acceptor sued the drawer he must state the fact that the drawee had no effects in his hands. The indorsee being sued has paid it. he states as before and that D procured the protest & recovered agt. B. & that A had notice of the protest. & the consideration promise — Thus all that is necessary to be done must be brot. in. —

2 L Ray 1544

2 Show. 180. 422
L Ray 364. 1542
137 U. 2 Sta. 817.
1 Wils. 185.

Held in Selwyn & P. 383. 7 D. R 596 quoted: that the delivery of the paper need not be alleged as it is a constituent part of the making.

You must state according to law. thus if a note purports to be signed by two & is signed only by one it must be sued as if signed by both. If signed by one

If a person who is clerk agent or servt. signs the operation is the same as if done by the master and is so to be declared.

To recover thus you must state all the facts making your claim — as protest &c. Some things are indispensable as The making of the bill, requesting payt. directed to the drawee & given to the payee or payable to him or order, the time of making is not indispensable to be stated tho it is usual. that it was presented acceptd & payt. was refused must be stated unless it was paid when payt. only need be averred. the quo modo is not necessary to be stated in L. M. by C. L. the quo modo must be stated as well as the quid.

Pur in ing

need not be stated for there is not the same nicety required in all L. transactions as C. L. where according to C. L. we describe so particularly it is shown that the instrumt. was drawn according to law.

If the actn. is agt. the acceptor the acceptance must be stated. presentment for acceptance need not. nor the manner of acceptance.

2 Show. 180

Suppose the indorsee of an acceptance turns out to be after the time of payt. the acceptor is as liable. The endorsee brings the actn agst the acceptor of the bill, who does not pay it. — All those facts before specified must be stated & also that B indorsed this bill to the indorsee D. which shows D right to the bill. — The word indorsmt. is all the technical word necessary if that is blk the indorsmt. is to be filled up at a time if the title under it is disputed. — If there are intermediate endorsements you must state that the conveyance be directly to the holder whose name if the former was blank or special until you come to the last or fill up all the blk indorsmts & include specially in the

The word indorsmt. implies a written assignment & delivery & the indorsmt. only & not the assignmt. & delivery need be stated.

If a bill is made payable to bearer it is unnecessary to state any endorsmt. if there is one it may be stated & must be if you intend to prove an indorsee to have been a bearer —

Suppose an actn. brot. by an indorsee who has already paid the bill. E dishonours the bill & regular notice is given. — one of the indorsers pays up the bill as D. the bill being in the hands of E. When D brings the action he states those facts above mentd necessary, stating the indorsmt. to show his title. then the dishonour by which he became liable to pay & did pay whereby

2 Eq. 595
1 Salk. 128
Carth. 509

the drawer or a previous indorser became liable to him & is frequently done to secure the indorser against the drawer

It is not necessary to state any promise for the law implies it at L. Mo. But at C. L. the is the there no reason for it & I think a decl. without the promise would be good on Dem. for every liability is stated there is nothing added: the promise is never proved & cannot be for it may exist in ded. the promise is raised by the facts — & I. to is necessary you never can draw the judg. from the court from the facts & know whether the facts alleged are a good road to raise this promise. because by Dem. you allow the promise. This is on the ground of an implied promise.

The holder has a great security — can he sue all? the C. L. maxim is that he may pursue one is unless at once & sue the all at once. suppose he should then sue he may recover judg. ag.st the all & yet he can never have but one satisfaction for the st tot tho he can recover all the costs. — One defendant put a stop to the whole by paying all the costs & the whole debt. that stops the whole — Suppose he pays up the debt & his own costs. Pltff can have Ex.n for the costs only ag.st the others. if he gets Ex.n for costs it is contempt of court. & he may be fined & imprisoned & forced to pay back the money.

"D'c dul the l cm is the sanm a to ntet of h aim.—

& if after judg.t is rendered the money should be tendered by the Deft. he is bound to take it & if he takes out Exn. it is contempt.—

In the act. by holder agt. the indorser he must state in addition to what is before mentioned that you got it protested & gave Deft. notice.— & in a foreign bill, the kind of notice is to be mentioned. in inland bills the manner will not be stated.—

(B) Suppose B gives the note to pay B or order — if there is no consideration & B sues he could not recover. but if B indorsed it over to D. If D should sue he would recover.

It is common to draw a bill payable to the drawers order.— such a bill if accepted & then A indorses it over it is a good bill.— it is a process for A to raise money.

Now in all these Decl. you must state according to the operation of law.

There was a question very much agitated in Westminster Hall as to the effect of a fictitious payee & the drawer indorsed in the name of the payee. The rule at first was that the payee hand writing was to be proved but this being inconvenient it was determined: to be the same thing as a bill payable to bearer 1 T Rep 484, 5, 183 Doe Bl. 315.

A bill payable after date you must aver

2 L Raym 1082

12 Mod. 124 6

1 Ld Ray 364
Carth. 459

10 Mod. 36
Str 131. 89

it to have been made on the day of the date. if there is no date that it was made on the day of delivery. By the L. date & delivery as to time are the same thing prima facie — this brings the presumption. it may however be rebutted —

If a bill were required or indorsed &c by an agent though agent is stated to have been drawn by the principal without noticing the agent.

So if the acceptance were variant the variance need not be stated. the acceptance only.

When an indorsee says it is said he ought to state that he has demanded of the drawer — when the paper or indorsee is said that this is done away & it is not now necessary for all the parties are equally bound.

There is a question in which it is said that are no direct authority — viz. can the drawer ever become the indorsee of the bill & sue any body upon it. I cannot see why he should not. — in the case in Bla. the bill had been dishonoured so that its negociability had been destroyed —

The drawer brings his action against the drawer because he did not pay when he had accepted. the question is ought he to state further that he had effects in the drawers hands? P. 6th & said not for the law presumes it & if the other side proveth

Pelk 128. Burt. 409.
1 Geo. c. 538

5 Vnd. 314

had not the drawer cannot recover — But if the acceptor sues — he states the common fact & further must remove the legal presumption of the effects in his hands by an averment that he had not. —

Where the honour acceptor sues he must state the protest & notice (that for the honour of the drawer he accepted & gave notice to those for whose honour he accepted.) —

Altho the consideration of a bill after negotiation cannot be inquired into; still the pleadings are as on a simple contract. — non ass.t or if on the ~~that~~ A Lim. the Deft. would rely non ass.t in par set counts. — There was a case of a special plea of a bond, made by an indorsee (in full consideration) the obligee) the Ct. held the plea not good for it amounted to the General issue. (should have tried it on a good plea. —

a Non ass.t in pleading means that Deft. is not liable at L.L. — that he never received, & is now the ruling C.L. & seems to be an improper plea in some cases — in C.L. cases the plea "Non ass.t" let the give any thing in evidence that destroys the liability. non ass.t is no more in reality than nil debit. —

Of the manner of holding proceedings against bankrupt. —

The holder may have security of the drawer, drawer & indorsers — one of them may prove a bankrupt.

3 Will. 13

1 Bl. Rep. 390
Dr Rep. 444
Stra. 946
Burr. 1354

and he may carry the debts & prove it before the bankrupt commissioners. — and receive the dividend if out of 100. the Drawee dividend being 25. then the drawers dividend is to pay when the remainder of 75. — If all are bankrupts. the whole debt is proved before the Com.rs of all & according to priority of time receives dividends on the whole until he gets the whole debts. 2. P Wms 89. 407. 1 Atk. 107 110. 2 Vesy 114. 115.

When a man becomes bank. the Law.r on his debts ceases if he turns out solvent the Law.r revives.

C accepts the bill without consideration. B the [illegible] & the drawee has become a bankrupt. & B goes to C & obliges him to pay it. & the bankrupt having been discharged of his debts the question is. does it release his debt to C who paid that bill without consideration. — & the principle is that the debts must be not only due but owing at the time of the commission issued

The holder sues the acceptor. the drawers hand need not be proved. for by acceptance the acceptor admits that fact. the law supposes that. but if it is in one of those kind of cases where he is sued upon a promise to accept. it not signing

to any particular bill the drawers hand must be proved. —

The hand of the acceptor in this act. is to be proved: — if the bill were to be seen that would be all that is necessary to be proved. —

The holder using his indorser. he must shew & prove the writing of any blank indorser before him. & they shew his right. — he need prove only one if that passes the right to him. & if the indorsements are special you must prove the hand writing of all. if not you can stick he out. — But why does not, it is said does not the acceptance prove the handwriting of the indorsers? the reason is the indorsers are strangers to the acceptor. —

The acceptance was conditional if the drawee is named the event upon which was the acceptance must be proved.

The indorser now sues the indorser. he then have to prove the hand writing of the indorser. — Str. Bl. 313. the indorser who is holder brings his act.n ag.t an indorser, besides the hand writing he must prove that he has given notice by way of protest that he shall look to him — if he sues the drawer he must prove his hand writing & also the notice. — But if the indorser sued the hand writing of the drawer

C&R 174
Stat 444
2 Bur 655

3 Wils. 18

& all previous endorsers are admitted by his endorsement & no need not be proved — if however he skips his immediate endorser. the admission of that endorser will not help him.

If the drawer was the acceptor he must prove acceptors handwriting or else and by the holder, & that to the bill has been returned to him & he has been obliged to pay it. but need not prove effects in acceptor hands

If the act. be brot. by the acceptor agt. drawer handwriting of the drawer, & payment by himself & also that Plff. had no effects in his hands. this is proving a negative.

The act. is brot. by an endorser who has not been damnified by any subt. but being he must pay it. goes & pays it he may then go & sue any of the previous parties. — but in order to shew his right to sue he must prove the payment by himself. In the case in Wilson imprisonment of the indorser was construed payment so as to enable him to come agt. the others.

As to the notice — This protest is conclusive evidence & cannot be got rid of — if it is said to be a forgery it is not necessary to prove the handwriting of the notary. all you have to prove is that the notary is regularly constituted by a certificate from the Executive. — The forgery must be proved. this

Gil Co. 118

3 T. Rep 29. 301

1 A Bl. 98
10 Mod. 37
1 Will. 185

1 T. Rep. 169

is to prevent the inconvenience & clog to business were Pl'ff to take the onus.

Where the Def^t. suffers a Difficulty when they come to press the damages, it is too late to prove any thing as to handwriting, the defendt. admitting all that is necessary to substantiate the suit.

It is a common thing in the mercantile world to draw accommodation notes. nothing can be recovered by B the payee; but after its negociation the drawer is liable — Unless it comes again into the hands of B who never can recover any thing on it. it is not equitable that he should for award him nothing. thus being no consideration.

I gave you a number of cases by which it seemed to appear that as to inland bills checks drafts &c the presentment for payt. must be within 24 hours.

A gave a note to B or order. B indorsed it over to C. it was payable on a certain day. all parties lived within 20 miles walk of each other. — C early in the morning called for the money. A was not at home & he left word for him the course & take up the note. the next day he promised to come & pay it within twenty hours. — The suit was brot. & the court said the note was dishonoured on the day of payt. & no

2 Bl. Rep. 170

Gil. Ev. 118
Molloy 281

tice ought to have been given that day to the endorser as it was not. — The court granted a new trial after verdict for Plff. because they said the court only and the judge of a reasonable time of notice. — & this point was established. —

As to factors. they have a lien upon the property of their principals. — W the principal had been in the habit of drawing bills on all. the factors & all of accepting them. — W drew a bill which was not a bill of exchange or being payable out of the next proceeds &c. — All. declined to — before pay.t W became bankrupt. & All would not pay it. The court held that altho a principal owes the factor in ready coin. if the factor accepts bills generally he shall pay them. he ought to have accepted specially if he would secure himself. —

I would remark several things that I have written. The law as it is in Eng.d & as we have adopted. it is a very ancient custom. & not the All. L. general. —

Whenever there is a refusal to accept if the drawer upon notice will give ample security to pay the contents at double the time. he shall not be sued. In Eng.d however & U.S. the suit may be commenced immediately. for this see Doug. Milford v Mayor.

Pothier. 146. 15 Ref. 4.
2 T.R. 336. 2 H.Bl. 61.

Esp. N.P. 516

2 T.R. 270
1 H. Bl. 528
521. 582

3 T. Rep. 301

It has been contended that if the drawer or endorser actually have become bankrupts they cannot make defence of "no notice" — 3 Br. Ch. Cash Bankruptcy 168. There are contradictory opinions & so it is not settled —

If the drawer has absconded or if he has left an agent it will excuse giving him no notice. The sudden death or sickness of the holder will excuse immediate notice for a reasonable time Chitty 89. — Formerly whenever proof by default was at C.L. or N.L. the damages were ascertained by jury — But now it is not done so if nothing is to be done for a proof. but by plain computation it is done by the Clk. This was always our practice. — — It seems to be useless to call a jury for all is allowed — But if it is claimed there is a proof. there is all the reason for calling a jury as in any case; however it is done with us by the 6th Bet B. 2nd 8 — We have seen that notice is required in a particular manner — when the writ is bro. the notice & also the quomodo or by protest must be alleged — & tho the jury find a promise there can be no recovery for the jury find only what is proved & nothing is proved but what is alleged — suppose no consideration was alleged verdict would not aid — if the notice was alleged but informally verdict aids. tho a

a demurrer would have raised the actual question as
Oldfinwall Doug. — That all this business can be
done by agents is a settled point in all L. The only
question is who is authorized. for if the agent does
what is not in his power to do the principal is not
bound. A factor has power to do all that the
principal could. — He must be supposed to have
at any rate. — this supposition imposing no strange
But with us at home the principal is bound
far as the agent has authority. — Case. A
gave B power to get a bill discounted to get
money & told B not to indorse it. B would
not prejudice however without B would in-
dorse in the name of A. — On the receiptal,
it did not come out that A ordered no indorse-
ment. A was held bound there being an im-
plied authority in the premises. 3 T. Rep. 757. An
express authority is not necessary. if the thing done
is in the usage of business it is enough — Ag. if
it is a thing not in usual practice. with if the
agent had been in the habit of doing this it
is fair to presume he had authority. — Held if the
has been no authority of any kind if the man
spoke to it, it is enough — A man has employed
a servant to do business of certain kind. in all bu-
siness of this kind the master is bound — by hypothesis
connection is disproved. — then the master must give

Geo. 75

6 T R 52

Bull N.P. 271
Cook Bnk. 168
Ld Raym. 744
Stra. 745

notice to all his correspondents individually or he will be bound by the acts of that agent in the business — if it advertised in a paper it must be proved that the man saw that paper or had the means of seeing the advertisement. — A man was arrested & gave his creditor a bill & he was discharged the bill was dishonoured. it was held that the man might be again arrested on that process. Ld Kenyon said the man had no authority to give the bill & as it was thus a fraud it might be treated as a nullity. But if a case should be without such apparent fraud such release would be effectual It has been said that holder cannot accept a part without consent of the parties under a decree by Bankrupt commission he makes the bill his own but there is no reason in it. In case of taking a bond for it & giving credit is a different thing 3 Mod. 87. The court often call up gentlemen to prove the usage of trade & will shew there is a particular custom different from the genl. M.L. it is proved. but if it is a custom very well known no witnesses will be called. It has been determined that if Ex^tr accepts a bill it is an acknowledgmt. of assets in his hands. — As to inland bills there was no particular form of notice required until the stat of Anne with which we have nothing to do. any notice answers — I dont know that there is any such law in the US. 6 Mod. 80. Ld Ray 992. As to whether

it was notice to mail a letter: it has been determined to be good notice — If a bill is sold it is a bargain out & out. If the seller knows the bill to be of no value the buyer may recover for it is a fraud. & the remedy is to sue the seller for a fraud. — Now it is the same thing as a sale of a l[illegible] horse. — you must however see an act[illegible] of fraud. — I should say that the contract ought to be not avoid entirely. 7 T. R 427 It is as criminal to conceal as to tell falsely. a bill payable by installments — it is said that if the first is not paid a suit will recover the whole tho' there are contradictory opinions. 1 Q Bl. 541. 6 co 1. 505. Andrews 370 The L.C. is that if nothing is said of Int. Int. is due from the day of say. But by all L. there is no right of Int. till you make a demand. — The reason is that by all L. you cannot sue untill demand. it is not so at L.C. for there you do not demand at. — Aq. the old rule was for Int. to stop when the suit commenced. but now it is that Int. goes down to judgt. rendered. — Bur. 1085 If a note begins "W. the subs." & signed by several. it is a joint note if such note begins "I the &c" it is several. — If an indorser where he sells, the bill of E & able to retain its negociability as by indorsing to pay to E only it was said E would not be bound by it. but now the rule is if E consents to it it binds him. — The holder has then E. & ag. the indorser. Occupy to & indorser. it is said all the bodies may be taken but he can have no fieri facias ag. each. Stra. 1019. — only one fieri can be taken at once & so in succession.

expressed. It is a promise to do some act or to abstain from doing it which will under it would have been considered under the head of contracts the object of this work is to show in what cases an action is the proper remedy

Appt. one of two kinds exists as when the terms of the case are settled by the parties, or when the rule of damages is to be found and agreed by the parties either by parol or writing.

An implied appt. is where there is no express stipulation or definite one entered into between the parties but there have been such transactions between the parties that justice demands one party to pay a sum of money to the other.
There may not have been any contract at all but appt. will lie because justice requires it. Suppose furniture a horse hangers to pay for the contract & appt. is express & if it is found the pltff. succeeds.

But are you into a store take up goods without any and be liable. the action is brot. stating the facts exactly as they were missing the promise. the law raises the assumpsit.

But there are cases in which there is no contract at all where one carries a forged letter or order so when money pay in settlement the law raises an appt. from the justice of the thing.

Perhaps the most common appt. arises in all cases where there is an express promise to pay money upon any bargain

Predetermination is the ground of the action. But all that is it just necessary to show is that it is just.

of the action is doubt. 2d. the implied contract may begin in indemnity.

Express agt. may sometimes be brot. when no the action will lie as when one engages to do some scheme not as to build a house by 1st Oct. & does not do it. Contract is broken & remedy is by damages. the sum can be only ascertained by the trial. Does agt. in the fact or written agt. if it is sealed it goes further & is an evr.

The principle on wh. an ex. agt. is founded is that the parties have agreed to it. An implied agt. is founded on the justice of the case.

Does 2d. that the grounds of implied agt. is a fact after all. more than an evr. in contract in which the law will presume a fact or going to trial before showing. but there are cases in which it would be presuming agt. evidence. as if a man sit amidst wrong by hands. or be force it would be strange to suppose him honest enough to promise to repay it. & so if a man turned his out doors. forbidding people to trust. him. &c The truth is that under the principle of policy steps in to prevent the law raising a promise from the justice of the case, as between one man unjustly detaining the money of another.

Express promises are explicit, & where it is impt. to out aside it. yet the law will not infer an agreement. nor is where the fact claiming is a quality guilty.

One cannot recover a gambling debt, nor against one who has paid it over, to recover it back. It leaves them in statu quo.

If however they are not equally in fault, if the innocent party may recover, then the stat. of usury only provides by the under. it declares the contract void, and has paid 12 per centum, he being the injured party, can recover the excess in trust: for in indeb. asp.ᵗ the party can recover back what justice & equity declares his due. This however makes the stat. the stand. and of equity & conscience.

Again the law forbids a man to sign or relative to make another a bankrupt, for money. If he was a bankrupt he should sign without, if not he should not sign with. a party applied to another and the cred.ᵗ requires pay.ᵗ the bankrupt with the money & he bro.ᵗ the action, recovered & I suppose the sister would have recovered had she bro.ᵗ the action.

In all those cases where there is a particular sum of money eng.ᵈ upon Exp. or Indeb. Asp.ᵗ or debt lies. Let however has gone out of use to wage law it was not abolished. but the asp.ᵗ was established by the stat. of Westminster

There are certain cases in wh. debt cannot be bro.ᵗ as where there is no privity of contract as by finding found anything &

tho you pay in ready money that action lies when indeb. asp. lies. but it is not true, indeb asp. will lie in many cases where debt will not. If one goes into a store & takes up goods debt will lie. it being implied by law to pay the market price

Whenever there is a real & perfect contract by which a sum certain is to be paid. Ex. Asp. indeb. Ass. & debt. either of them lies.

Where the promise is to do some collateral act ex. Asp. only lies. for there is no sum certain to found debt nor arg. to pay any money. i.e. no damages ascertained.

But an pract. one goods in a store ex. asp. does not lie. for there is no precise agt. but debt will lie because the sum may be made certain as will indeb. asp.

But one has got his neighbours money by a fugitive paper. or the consideration has totally failed. indeb. Ass. lies. & no other action but asp. lies.

In some cases there a quasi action lies if one cheats another he may sue him for the fraud this action goes upon the good of demanding damages affirming the contract, and Ass. disaffirms the contract.

So if by force money is taken. Asp. & battery lies or money had & rec. & so if one takes upon him.

When there is an w. ap^t. & Def^t. does not fulfil it, you may affirm that it as a contract & bring Ex^t. ap^t. & recover the damages. or disaffirm the contract by bringing Trover ap^t. & recover the money paid.

I sells him your mare for £10 if you think he made a good bargain.

If you pays another money to induce him to return your article if he does not fulfil the contract you may bring an action for money had & received as affirming the contract for whenever one breaks the contract, the other treat it as broken or as if there never had been a contract. Or you may sue him on the sale's contract for not performing it and recover the damages.

Of these two actions you have your election as which is most for your advantage.

The action of indeb. asp. when concurrent with Ex. Ct. in some cases goes simply to the same point in other it does not. As if one pays money to another to transfer to him bankstock. Now if he sues in indeb. asp. he goes for damages. If for money had & received he goes for the same point.

Now in these cases it is immaterial whether there is a writing in the case or not.

It is a rule that the only action is Ex. asp. when the contract is to perform a collateral thing which the money has been paid.

And again whenever one retains money was wrongfully yours

*unless some principle of policy intervene.

may recover it in indeb. ass.[sit] in which the servd. has failed. it is not reason why there should be fraud in the case as if one sells your property & you pay for it, which he really supposed to be his, you may recover in an act. for money had & rec.d or on the implied warranty. When one cheats you, an act. of fraud lies or money had & rec.d or obtaining your property wrongfully you may sue in trover or for money had & received.

One set of cases are agreed to form a collateral act. & the parties agree upon the sum to be forfeited. an act. on the check promissory or of debts or of indeb. ass.[sit] to recover the money either of them, lies in this case.

In declaring in ass.[sit] the fact whether in writing or not need not be noticed. the action may be brot. upon the writing with a precept or the writing may be adduced in evidence.

As to proof. an action was brot. on a contract whether the act of Frauds & Perjuries as to pay the debt of another. it is not stated in Dec. whether in writing or not. & Pltff bring up writing to prove it. Deft. stops him with the statute.

But ag.[st] a contract is written and an act. is brot. on it. no other proof is admitted but the writing itself. this stood on a diff.[t] ground to was the other. in the case of the

2 v. 3 inv. 1014

contract within the stat. no other than written evidence can be admitted. but in this case. as if it were a promise to pay $100 for a horse. this contract might have been proved by parol had no writing been taken. but in all cases the best possible evidence must be adduced. which in this instance was written. —

Whenever a con. either parol or written is afterwards reduced to a sealed int the right of action in assp. ceases, quere but not universally.
When the bond or sealed contract covers the same thing, you cannot bring assp. Thus if one promises to do a thing & fails & then gives a bond for damages.
But if the bond is only to enforce it you may sue on bond or in assp. as D'nt agrees to go to Hartford & gives a bond with a penalty. Whenever the promise is not allowed in the bond you can only sue on the bond as a bond of arbitration. which is given to enforce performance. you may sue on either the bond or award: but if the bond is given afterwards for the award you can sue only on the bond.

As a promise may be alleged negatively, when there is a bond in existence. as to pay that bond.

Indeed assp. which extends over so many cases, defies classification by cases. I will state the principle. Whenever the case is such that to institute the principle is justice forbids it.

So if one is absent seven years an administration is granted and his estate distributed. if he returns he may recover his property back

Ld Mansfield observes in 2 Burrow. 1004. "the ground of the action which fail[illegible] is not that the judgt was wrong. but that for a reason which the now Pltff could not avoid himself against that judgt) the Defdt ought not in justice to keep the money. The gist of this action for money had rec.d is that the Defdt upon the circumstances of the case is obliged by the ties of natural justice & eq.y to refund the money.

It is generally true that money paid on judgt. thereon wrongfully (tho' it were by incompetent jurisdiction) cannot be recovered back, except after reversal but this rule is not universal.

You may recover money back which was laid in consequence of judgt. on the ground of impeaching the judgt. of the court. & when you recover it does not at all impeach the judgt.

Thus a sheriff

has been sued for a wrong done. he has left the prisoners confined by a judgt. he makes good the debt. the prisoner sues, the prisoner may recover it back. but it is on the ground of some new fact discovered. & not of impeaching the judgt. & numerous cases may happen, in which, circumstances that show the money ought not to be held — may be made a good ground of recovery.

Agn. a sheriff is bound to pay the debt of the prisoner he escapes. upon sheriff being sued in action agn. escape & recovery. then the Defdt. recovers of the escape, the sheriff ought not to retain it to be recovered of him. must he hand over to him & this does not impeach the former judgt. the recovery by the sheriff was no bar to the Defendant as the escape for Deft was not bound to resort to the sheriff. 1. Ld. Raym. 281. 112

Another notable case included the action of Indebitatus Assumpsit is when the consideration has failed, the thing bargained & sold value the seller

1 Kh. 432

1 Kh. 59

had no title. fraud makes no difference. you may in such case recover back the money paid.

By Eq. at

whereon one engages to pay another annuity for so much money but which amounts to more than lawful interest it continues only during the borrowers life which is seen by the lender. it is not usurious. it is a calculation upon lives. this is an annuity bond. the Eq. stat. provides that such bonds shall be void unless the money is paid down. an action upon an a bond where part was paid in money & part in goods. Lep. held the stat. avoided it. but the Plff could recover the consid. in Indebitatus. there being no forfeiture. nor the value unjustly detained.

Claim to case of a sale without fraud. where the seller had no title you may recover the money paid. or when the consid. entirely failed. for there must be always a good consid. as if poor man sold it it from good for nothing. In this case borrower are ent. lies on the implied warranty affirming the contract and recovery your damages.

An Indebitatus lies to recover money which has been paid under void contract. there are diff. opinions as to what is a void authority. it was a ent. of B. E forged a power of atty. to receive this money & B. says it became still received to auth

Lett. 27.

1 £. 3 s. 4 d

Otr 2. 915

and money did not [illegible] and money in his
afterwards a will was discovered & Pltff was not a [illegible]
the Ex[illegible] of the man in his [illegible] but it
was incorrect as [illegible]

Sam[illegible] said that if the court
had power over the suggestion to a [illegible] side
although the Atty. had to bring [illegible] the letter
of the Ex[illegible] must look the Administrator otherwise
the money be [illegible] hand and no doubt
would be [illegible] in paying to letters of Admin[illegible]
3 Ch. Rep. 125. where a will was received from probate in [illegible] Pltff
to satisfy the debtor in paying altho the will was in fact forged.

So if money is taken from a [illegible] by [illegible] of the person or
by any under advantage [illegible] this action
extends as far as a [illegible] of [illegible] If that court would
relieve against a bargain made where there was a secret of law
would support an action to recover money if it had
been paid on such a bargain.

So where an [illegible]
his plate & the [illegible] would not suffer it to be
retained without some [illegible] [illegible] the [illegible]
had it and [illegible] recovered it. altho he made
[illegible] recovered his plate in [illegible] & this is the ground
on which money is received back i.e. the same [illegible]

[illegible] in [illegible] recovered [illegible] [illegible] afforded by his

2 T.R. p. 763

money paid on an illegal contract when the law inflicts no penalty on the payer is recoverable back.

Bull N.P. 131
Cowp. 419

If the money be some coll. [illegible] 5s. [illegible]

creditors release for 5s, in suit on their debts. one creditor however refused to accede unless he was paid an additional reward. the debtor gave two notes of £25 each he could not recover on these notes & if they had been paid the money could be recovered back in Indebt. asst.

So money obtained by cheating or in any other manner wrongfully. this action lies to recover

As to those contracts in which one party is criminal or both are criminal the rule is that the party who is not punished by the law can recover back money back v. Bl. Rep 1073. 1 Ohn Bl. 65. Cowp 7.90.

money received on an unjust judgt. may be recovered back where that judgt. is reversed. but if the judgt. was void as if a justice stands under judgt. where he had no jurisdiction, but if not void it must only be recovered after reversal.

This is also the action for recovery of forfeitures under the byelaws of Corporations Cowp. 90.

So for services rendered then being no express agt. or for goods sold & no price agreed on. money lent no agt. to pay it back. Indebt. asst. is the proper action in all these cases. if the agt. was express an action of Ex. asstt. also lies.

If there were can establish an express agt. between A & B. Express asst. lies, if it were to pay money Indebt

apt. lies. To establish a specific debt you must have an express contract to bring the debt within the general law, proven in debtor's favor, in which there is no debt as if money were loaned. Whenever a contract is entered into it should not contain he must be subject to the civil act.

If one stands by & suffers another to sell his property as the selling which really belongs to the former the former cannot recover it back. By same principle a mortgage who does not give notice of his incumbrance, is postponed, if known obliged for information.

You will find it laid down that where one pays money without the other consent the payer may recover it back in some cases, in other not.

One may trust his wife & children. or his children. a mere remuneration of the husband or father for furnishing them with necessaries.

The person supplied must be a person entitled to the protection & support of the person against whom the action is brought & whether the articles furnished must be necessaries. So if one who is able to support or protect a person whom it is his duty to support if he does not do it. & another person does he may recover of the person in question for money laid out & expended for his use.

Where there is an express contract there is always an implied warranty of title. & if the title is bad

5 Burr. 2639

the buyer may rel on the implied warranty in bring an indeb. asp. in error the money paid

Where you bring

Indeb asp. you in error recover damages, i.e. nothing more than the money paid & in some cases not so much.

The rule is that if the Ptf has any equitable claim against Deft. he may make an offset as in the case noticed of the shift & escape. the Shff may retain his costs. 2 Bl. Rep 1078.

This action for money had & received cannot be rel in some cases in which law reason & justice appears. E. where a Landlord wants to admit to commen without pay in additional rent. this action would not lie for the money because a title to real estate cannot be tried in this action of Indeb. asp.

So where an agent

to take two horses & pay for them & if he did not like them to return them & take two others. he returns the horses & then brs. Indeb. asp. for the money it was not maintained because the bargain was not at an end. it was still open, he having no right to take other horses.

So a man bd. a pair of horses with leave to return them if not four years old. they proved to be not four yrs. the purchaser kept them too long. the court decided that he did

2 St. Bl. 144
Dung. 105 112

Bulk. 1 N 128
2 St. Bl. 553
3 Mod. 181

not fulfil the implied contract to return the horse within a reasonable time, so that he could not recover in Insebt. Asst. yet on the warranty by which the purchaser affirmed the contract, he recovered the damages arising from the horse being five.

There was no form of action founded upon promises; an action on the case was given in the room of debt by stat of Westminster. before that no action could be brt. upon a promise to do a collateral act unless it was under seal.

The gen. issue is non Asst. by which is not meant that Deft. never promised, but that it is not binding upon him: Under the gen. issue of non Asst. performance may be given in evidence

Ex. Asst. lies only on express agt. either written or parol. the only difference is if there is a written promise you cannot prove the parol one, and the written evidence must be the rule of damages.

The ground of recovery is the agt. which must be proved in express Asst.

Implied Asst. is founded on the moral obligation to pay. where there is an express. Ex Asst. also lies.

It is not every or supposed promise that founds the recovery in implied Asst. the rule is whenever one is benefited in good conscience to pay Implied Asst. lies. there is no rule of damages. the man recovers what is equitably due

There are cases in which Defts. have reserved to themselves the right of failing in performance on condition of forfeiting the penalty. when Debt ag.st lies for the penalty and not Ex. ag.st for specific performance or damages. The proposition however is true that when the penalty is not intended as satisfaction for the disappointment the remedy is only by ex. against Defts.

2 T.R. 648

When labour is performed the rule is the worth of the service or the value of goods when sold without agt. as to price.

The usual mode of suing to recover a demand by note in most states is on the indeb. asp. the ex. asp. lies, but in Con. the practise is to sue in ex. asp.

When one promises to do a collateral act. if he does not & you have not paid him. ex. asp. only lies. if you have paid. indeb. asp. lies.

So when the parties agree upon a penalty for non performance, you may sue in indeb. asp. in the penalty or in ex. asp. to recover the damages

But it is not true that in all such cases you can sue in ex. asp. when you can only recover the penalty. 5. T. Rep. 603.

There is no such thing as debt now but for goods sold when no price agd. on; the debt would lie. indeb. asp. in the action. 3 Bac. 163. Comp. 116. 796.

The proposition that the action of indeb. asp. will lie only when debt will not lie. 2 Burr. 1008. 1 T. Rep. 285.

When money has been obtained by fraud you may sue for the fraud or affirm the contract allowing him to keep the money or rescind or disaffirm the contract by an action for the money he did receive.

Ed. Dig. 141
Bull. N.P. 129
T. Rep. 110

But if both are not equally guilty, the injured party may recover it back, as in case of usury.

It was long questioned whether a man might be subjected for the reward promised in an advertisement. it was said there was no promise. but it has been settled that it can be recovered by the man who entitles himself to it. the case is like that of a note payable to ad or order. there is no need of a ct. to make it negociable.

When one has agreed money you can recover it back if he has no right to hold it. unless the contract is still open as in the case of the contract for the horses before mentioned.

A man may be a tort feasor. as by taking your horse & selling him. his tort or trover. or in debt. Ass. for lies. it amounts to this that you can treat the man as your agent. 2 Ray 1217. Comp. 419. Cook A. P. 131. 1 T. Rep. 38. 2 T. Rep. 68. Defd. cannot say that he stole the horse & thus avoid the action.
Money pd. on illegal consd. cannot be recovered back. where the parties are equally guilty 1 Ew. R. 266. 5 T. Rep 405. 7 ib. 535. 1 Fonb. 218.

So if vendor had no title this is the action to recover the money. Stra. 206 1 Fonb. 363. 5 T. Rep. 716. & so if the property were of no value. so that the consd. entirely fails.
Money may be recovered when pd. under void authority. but not under pdg. of a writ when it becomes unreasonable for Deft to retain it. 2 Hen Bl. 409. 416. 1 Hen Bl. 665. 4 T. Rep 488. 7 T. Rep. 269. 2 Burr. 1005. 3 Burr. 1354.

The Decr by C L does not state how the money was expended. the state that expenses the quo modo to be mentioned in the Dec^r.

Ld Ray. 1210
11 T Rep 464
5 Rep 824
Bac 2630
Comb 565

There is a question which appears not settled. If C. delivers money to A to pay to B in A's favour. A delivers not delivers the money: can B maintain an action on the contract against A? I conceive the person who is entitled to the money has a right to sue on the contract i.e. he may treat him as his agt. 1 Bac 242 in analogous cases Esp. 576. 1 Vent. 318. 3 P. Wms 35. So decided in Ps Carolina. There is no doubt but that in debt Ass. lies.

The rule that Ptiff cannot sue in in debt. Ass: when he has a remedy at a higher rentation must be understood with some qualification. nothing is clearer than that if a bond is given for a debt due on note or money no action lies on the prom. But if the bond was not given to secure the pecuniary contract but to enforce it you can sue upon either.

Whenever one complies with another to pay money or return it to great inconvenience. the man may pay it to the person in an action for money paid to use. the money being acquired by obligation. so in all cases where one tortfeasor has an advantage of another whether the latter were in fault or not. I get money of him. it may be recovered back in this action. Comp. 197. Burr. 1384.

When money is paid by mistake into the wrong hands or too much paid: this action lies. If paid by mistake to an agt. the action lies against him if not paid over.

This action lies in all cases both before & after paid over agt. the principal. The agent receiv. is the agent of the principal

Defences to this action of Assumpsit.

Coverture is a defence not only to assp. but every other act growing out of contract. So infancy, and in most cases one must plead infancy specially tho' it may be given in evidence under the gen. issue in asst.

Infants are liable in some cases on contracts & this is the reason why the deft is not discharged if it appears on it that ptff is a minor.

This is one case in which infancy is no plea. that is in mitigation on a contr. of warranty. but not ag.st the bar of commencement.

Impossibility of performance is a good defence. by that is meant that which is impossible to perform in the nature of things. If the contract was spread upon the deed it would be demurrable. yet if the thing were impossible to deft. merely as for a pauper to pay £100. it is no plea.

If the consideration of a contract it seems becomes afterwards impossible. the contract remains good.

But if a consideration which is annexed to an ex.d contract becomes impossible by the act of God or by the act of the party to be benefited. the obligor is discharged. case the same if prevented by stat.

Ex. where an is paid for doing a thing which becomes impossible or unlawful the party paying may recover it back.

1 Sa 12: 1-2

Pl. xxvi. 34

[illegible] a servant of an employer suffers to be taken in that exclusive sense. It is a function the most lawful, the highest honor, and the most complete to execute the function made under such circumstances. Esh. Lig. 16. 6 T. Rep. 642.

If one promises to do an act impossible the promise is not binding but if an impossible condition is annexed to a bond the condition is void & the bond good. But if the condition is inserted in the body of the bond or expr. the whole is void. And it must seem that the rest of the condition is not founded in principle. for I consider a bond with a condition

A contract which is unlawful is not binding: If the thing to be done or the consideration is unlawful the contract is not binding. As a contract not to appear at court to testify. A contract to pay money for an illegal act is void the act having been done at the request of the other. It is immaterial whether the act was malum prohibitum or in se. So a contract having a tendency to encourage a breach of law as a promise to pay a sum of money to beat another. so a printer who requires an indemnity for publishing a libel. the indemnification is void. So a contract to pay wages to a confederate at an election for that is a contract not into to cheat bona fide purchasers. If one of the contracting is induced by mistake or is in fault if all the facts are stated you may demur to the decln but if it were in a bond it must be proved. If a promise is made to pay 12 p. ct. & a declaration is demur stating at your demurrer. If it were in debt you must plead it. It cannot be in effect pleaded in evidence under the gen. issue. If then the proof of the money is by parol.

a usurious contract is void and if the usury is proved then cannot be recovered.

There are two kinds of usury one of them arises from a mere bargain only &c. the other kind does not avoid anything but the taker subjects himself to a penalty.

Receiving too much in a contract avoids the contract but does not subject to the penalty.

But if too much is taken on a contract in law? the contract is not void but the receiver subjects himself to a penalty and any person conveniently may recover it.

And if too much is received in making the contract & too much is taken, the contract is void & the receiver is subjected to the penalty Doug. 323. 3 Will. 250. 2 Bl. Rep 792. Cro. Eli. 20. 1 Saund 294. 2 Mod. 307.

On this subject there is a case much similar Suppose one wishing to borrow money gives an immoderate & takes $100 & then gives a note for $100 is the note void? Doubtful whether that is immaterial not of which part the usury is. the contract is usurious he parcels you a note of $100 for $50 & the premium the cut under the name of rent constitutes the usury. Above loan usury. Suppose a bargain for the premium sum & then takes a note for the complete sum. no that only the cor.

*1 Odt 301

Cr. Bl. 602
Earth 158
6 C. 61
2 Bur 714
1 Dren 8
Hard. 518
1 Ves 164
3 Mc. 313

right first should be unexpired" i.e. the law under the which were the same as if it had been enacted in one ability" the instruments being in pari materia the same subject at the same time.

It was decided that it was unnecessary to pay the int at the time of the money borrowed. But the custom of Bombay has established the practice & this in strictly speaking it is wrong. But law does not now consider it unnecessary from the inconvenience & trouble that would arise should it wish to pay the int upon a note at any fixed period of time. At the end of a year it could not be at

If the object of a state is a loan & the nation is solely interested by more than it is with the contract is void, but if the contract were a mercantile one it is not unnecessary than if you pay down the whole shall be made valid than if you pay in 6 mo. as is the constant practice of merchants.

*When we have given a check now is to be received then the legal interest which one state not usurious. In other cases the principal & interest on both payments the bond must be bona fide. As in the case of bottomry bonds by which money is received but to be returned with int not int. or not interest at all according as the ship returns safe or not. & this is the principle on which usury laws are built not usurious

[illegible] 862
5 [illegible] 29
[illegible] 1853.259
209. 501
6 [illegible] 17
2 [illegible] 88
[illegible] 1

the principle & interest, yet both have a debt. But if they are a mere colour for usury they are void.

Chinese bonds with penalties are not usurious, as for $100 conditioned to pay $50. because the man is not obliged to pay the penalty. but if that were part of the bargain that the penalty should be forfeited it would be usurious. for intention it is which destroys the contract so that a mistake cannot make a pay. usurious as in setting the interest. - 1 Hand 245. 248. Cro. Eliz. 595.

An usurious contract may be purged, the common mode where too much is received is thus a debtor owes an usurious note to B & B then, later or new note of A for the full sum the usury is purged & collectable. But if the usurious debt had been given to B or to his representatives it would continue void forever. & so in the case on hand if C had endorsed it back to B it would be void in his hands.

A was indebted in two notes, one usurious the other good. he gave a new note for both & B the creditor sued upon the new note & recovered. but B. after much discussion was adjudged able to recover upon the single good. Quad all usurious sums are purged the division. If one fraudulently issue, impress his letter & exacts a bond for the debt, yet the bond may be avoided for duress, still the debt on the original contract may be recovered

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the court held the language improper.

Burr 1077

B made a contract with C which was usurious & got A to be his security by giving him a bond of indemnity, & when the debt was a suit for the money. the court held that he could recover upon the bond. B said "why did you pay. I intended to avoid the bond & you would have been indemnified." The case of a contract made where it would not be usurious & a security given for it in a state where the stat. made it usurious. A of E. gave a note in C. for 1 after money paid? A gives a new oblig.n in Con. & for seven per cent would it be usurious? the difficulty is entirely technical. the contract was a fair one originally & is not of that class of cases contemplated by the statute. the creditor was fairly entitled to recover. it would be strange to suppose that the legislature intended to make the security on a good bona fide contract void. It has been decided in Mass that such an oblig.n was not void on acc.t of usury. there have however been contrary decisions in other states.

Suppose a contract made where usurious but to be performed where not usurious. thus a contract in Eng to pay 7 p.r cent the Irish interest, payable in Ireland. In the case of R & Bland. L.d Mansfield declares it not usurious for nothing is necessary to make it good but crossing the water, & that has declared such a contract not usurious for the safety & accomodation of West India merchants

Suppose a contract made when it would not be usurious, to be profound when it would be usurious. –

Suppose A goes on with B to Boston & then gives him a note at seven p^r cent. the object being to make the sale I suppose it would be usurious.

The recovery is to be of the same rate of int. as the law of the place where the contract was made declares legal. the lex loci governs.

Whenever a contract is entered into by which some right is claimed under the positive institutions of some country. that right may be enforced in any other. and the only exception to this general rule is where the right arises out of some act which is malum in se. in good conscience. Upon this ground it is that seven per cent may be recov^d in Conn. on a contract made in New York.

There are many cases in which contracts are void the act malum in se or malum prohibitum. they being against good policy. and they can no more be enforced in E^d than in law. as in relation of marriage. as not to marry any but a. &c. Yet there are two classes of contracts which are, be recovered on at law in which E^q will still on acc^t of the consideration not be consistent. and the reason is a string at law or E^q but courts of law have adopted short of a very good reason either to the full extent. whereas the general dist of E^q having arisen when the minds of men were more liberalized

Thus a court of law would never chancery down a bonds. and were very unwilling ~~to hear~~ Lord H. Moor applied to them to adopt the rule of Eq. However timidly about it

Marriage brocage bonds entered into to secure the influence of some person in advancing a marriage on these bonds a court of law will suffer a recovery in spite Ch. will set them aside.

The other class is that of contracts with Ladies by which the latter engage to convey their reversionary inheritances. A court of Ch. will these contracts. and courts of law altho they do not say that they are void altho they will infer them. 2 P Wms 121. 2 Ver. 346. 2 Atk 34: 1 Atk 354

It has become settled in Eq. & at law that a contract to pay interest upon is not usurious. still it is so far against good policy that no more can be recovered on it than the principal & legal int. since by.

Such contract is clearly not usurious. if the interest is paid it clearly may be loaned & as well to the ingt. union as to any one. it is clearly then legal & the only question is policy. the creditor must call upon debtor for his interest he may sue for the interest & then afterwards have a scire facias upon that judgt. to recover the principle. —

A contract is given to pay simple int. & after 1 year at that time a new note is given including the int. it is not usurious. Comp. 112 770. 793. 47. 5 Burr. 2082. Yelv. 7. 1 Bals. 17. Long. That is provided the debtor does it voluntarily & not when threatened with a suit if he does not.

I think it questionable whether the surplus money will be recovered in all cases. Suppose the lender can use his money to great advantage. & is no usurer not in the habit of lending money, suffers great inconvenience to oblige a neighbour. ought he to be subjected & obliged to refund? I think it should be determined from circumstances. the question is can he in conscience retain it? the stat is a mere positive regulation. Another defence is that there is no consid. the question is not mentioned, tho it must be something. for without one a contract is void. This does not apply to executed contracts as if one should give another $50.

In every cont. contract there must be a consid. whatever be its form. & if a parol contract without consid. is declared on without stating consid. you may demur.

But if one sets his hand to a written instrument acknowledging a consid. (where there is one stated in a decl. on a written contract) nothing but written evidence can rebut it. & it will not do to demur.

But the recitals of an instrument are prima facie evidence against you and you cannot get to show that it was not the consideration stated in it. The consideration is but one and the quantum of consideration cannot be shown the damages will be merely nominal. Account of Ex. will show a case of specific performance of it.

Suppose however the court forms not the consideration and on examination it appears more than a pound for this can be no recovery for the legal presumption of a consideration created by the instrument itself.

Suppose a bond is sued to pay a sum of money could you enquire into the quantum of consideration? The rule is that you recover the whole sum. Where on a note or cont. you recover as before stated, where no consideration can be shown damages are merely nominal. The reason of the difference is that the action on bond is debt in which you are to recover the whole or none. In that case enquiry into the quantum of consideration would be entirely nugatory. Prov. on Ex. cont.

Where consideration appears on a written agt. you may state it as one in the decl. & prove it by parol, admitted to prove it. For this stands on a footing with the written instt. altho it cannot be introduced to contradict a written instt. As a note given without an insertion of "value received" you may state the consideration in your decl. as a loan & prove it by parol.

If you defend on a ~~tor~~ of ~~offe~~ on the statute of limitations for which see post. You will observe that there is some difficulty arising from the application that does not fall within the statute. There is some doubt before the administrator can be appointed that it may include some of the obligations of the deceased, but the courts will allow a reasonable time after the death of the intestate before the statute attaches. So in case of Bill.

Also if judgment against is recent the body commences, or now the court will give an indulgence of one year.

Now as we have taken out of the statute the case which includes all within ~~the~~ time limited by the statute.

The next offence is a Trustee which is an offer to pay a debt or to perform a duty which he knowingly knows that he or the same liability on the trustee as if the debt were paid or the duty performed.

~~Co two~~ If the person to whom you would be the designated representative of the company or incorporated forbear ~~non~~ any action of his: then if you find that you were ready to bear or to infer the

duty or to pay the money that you had the money
due for the future it is sufficient.

When is this a good defence? It is a good de-
fence in all cases where the demand is uncer-
tain or the damages are uncertain, in which case
you are not entitled to a certain sum of work
by a certain day then if the tender is lawfully made
it is a defence. But if the damages are uncer-
tain, as in tort, it is no defence.

Whatever can
be reduced certain is considered certain. Thus if
one works for you a day without agreeing on the
price a tender of the usual price is good.

Tender then is a good defence to an action on an
express promise to pay money, or note, on quantum
meruit, quantum valebat, or contracts to do a cer-
tain act &c. — (But is no defence to torts
where damages are uncertain, nor on contracts
where the damages are to be ascertained.
A young lady may not an action on an engagement
in, thinking the diff. pleased tender! It would
have been a good defence if the jury had not
resolved that the tender was not sufficient! —

Next as to the duty of those who make a tender

2 J. Ep. 2.

If the contract be to pay money if the trustee will not receive it & hire trustees you must pick the money ready to be delivered to him when he calls for it. if the trustee were insufficient he becomes bailee for the remainder & an obligation is bound only to good faith

That if the contract be to give a collateral act as to deliver a horse or a yoke of oxen. if the trustee will not receive them you may leave them as if you please pick them till he calls for them & if you do not then deliver them as you are liable in trover. for notwithstanding the refusal the property is in the trustee the debt or duty is quashed by the origl. contract being discharged.—

It has been a question what is bailee in case of money the property invested in the due of the refusal. I consider the trustee the bailee of the trustee & accountable like also other bailees for that cases. nothing in law not the obligation derived from a pay & detinet that if the property is then lost by accident the trustee must bear it and that the contrary authorities are not be correct. the bailee is the trustee is a bailee liable only as such. M. has an interest which he offers to give it up. the question was answered in the trustee was called & the money was then lost by fire or accident. it was decided that trustee was to be the safe

And altho there are many authorities against it, yet we find a very important parallel case in Davis' Reports, an Irish case of good authority. Certain shillings were made current by proclamation of Queen Eliz. Often was some question, pleaded that they were deficient in silver, & the maker & tender of them to his creditor, refused them. In trial these shillings were found worth only nine pence - after the creditor sued the debtor & the latter pleaded tender & that he was still ready to deliver the money in such shillings which were good when he first tendered - that the money had ever since belonged to Diff & that he had kept them for him as bailee which money in shillings he was now ready to deliver - this plea was held good by the court & it was decided that the loss occasioned by a subsequent depreciation of the coin should fall on the tendrer. Davis Rep. 19. 27. 1 Dyer 81.

Such was the result of the deliberate examination by the twelve Judges of England of the contrary authorities and only certain elementary propositions that the debt debtor is still in the tendrer.

Why then is my broker, or the factor to receive the money? Because that should of course be paid to me as the principal. The agent is only a mere bailee for the tender of his property, and the tender is

only to carry the money into court & deposit it with the Clerk & the costs of suit are cast upon the Pltff.

If the debtor is sued after having made his tender & there has been no other diminution of the property he is liable only to pay the tender & will then recover his costs against the Pltff.

If however the property has been diminished before suit brought & he refuses to deliver it up he loses the benefit of the tender, with the exception that the interest is not to be computed from the time of tender made — from demand made it draws interest.

The demand must be reasonable not made when the tenderer is home during he cannot be supposed to have the property & the money by him — If no demand the property is not delivered up. If anything other than money the tender may maintain trover: but if money trover will not lie unless it be in a bag or something of the kind. debt is the action

The law of tender is generally reasonable but there is one thing which seems to me unjust & unreasonable. Thus when A contracts with B to deliver a piece of work on a day certain for $500. A tenders performance: B does not accept, but lapse for the best performance yet A will recover the whole sum

agreed upon $500 the same as if he had performed the work. But I conceive that ch^d would give only simple damages for the disappointment. and this is the law in Con. how far it prevails thro the U.S. I do not know.

What constitutes a tender. It is not enough for tender to come to tender with his money he must absolutely offer it which tender says he will not accept. Esp. Dig. 163 Salk p. 2 Inc 209. 3 Ch 164. Co Lit 208

If he carry the money in a purse or bag it is not necessary that he should take it out & count it for tender that is tender enough. His witnesses however must have ascertained the sum in the purse. Co. Lit. 208. Ld Ray 686.

If tender is made on two or several contracts he may direct on which of them the payt is to be made or applied as (e.g.) on the one that draws interest. If he does not direct however, the tender may apply the money to the payt of either of the contracts at his election.

If the sum tendered falls short in the least it is a bad tender. & it was once agreed under written a tender of more than was of was a good tender now settled that it is good for some wages & contract

in re minus & the other party ought to accept so much of it as is due to him. 5 Co. Rept. 115. Extra 916

"The money tendered must be current by law. Money current with the people is not suff. yet if such money be tendered & tendree make no objection on that account it is good. whence if he says "I do not take such money" or "I do not or will not receive bank bills" it is not a good tender. 5 Co. 114

It has been said & it is laid down shortly in 5 Co 115 Bancroft v Wade, that if counterfeit money is paid in tender the tender both parties being ignorant of its being counterfeit, there is no remedy for tendree who received it. for when he accepts the money it is at his peril & after that it is allowance he shall not take exception to any part of it. Eq. Ca. Abg. 390. 2 Bernaford Co Lit 208

But I think this questionable, for there should and ought be a remedy on the footing of a mistake & it is a gen. rule that where a man parts with that which is valuable he must receive that which is valuable in return. 3 T. Rep 554 1 Ld. Ray. 173 1 B & P 526. 1 Bay 62. 185. 2 Mass 282 1 Dall 406.

When a tender to be made. When the court act upon points, but generally there is no place agreed on. The money is commonly made payable to the person without specifying the place where. The rule then is to pay it at his dwelling house if he be there, if not to his agent if there be any. If there be no agent then send it to him if he has gone abroad if he is absent then get witnesses to testify that you were ready to tender but could not & you will derive the same benefit as if tender had been made Esp Dig. 15 G. & Co. 114.

It is said that the following case is a violation of the rule, a person who lived at Oxford in the summer & at London in the winter sent money to a person in bill in the latter place. The debtor went to his residence in London & told him he would pay the debt on a certain day he made no objection. On that day the debtor accordingly took witnesses with him & went to make tender but the creditor had removed to Oxford. This was decided to be a sufficient tender without going to O. on the ground that there was an implied promise on the part of the creditor to receive the money in London at the time appointed. 2 P. Wms 378.

In case of Rent however the rule is different in Eng. By a law of that country the tenant may

tender at the lower mansion house to his steward if he was himself absent. If both are out of the way proof of a usage to tender there is sufficient. This law was made in favour of tenants to include the necessity of their travelling out of the country after their landlords.

If the tender is to be of some collateral article as corn, salt, coal, ice, and hay or offer of the article at the house of the tenant is quite good but if it be equally convenient it must be delivered wherever the tenant directs as if tenant lives at a place 5 miles distant & had sold it to a man that lives 5 miles distant in another direction; at the request of the former it must be delivered to the latter. And it must be delivered to tenant at his dwelling or place of business at the time of the contract made. or if he has removed to a place equally convenient for delivery then at the latter. So that if A hires, then contracts to deliver to B who lives at the time 20 miles distant but has since removed to a place 10 miles distant: & B having sold the article to C who lives 15 miles distant requires A to deliver to C & denies compliance for it is more convenient to carry it 15 miles than 20 the original place of residence at the time of the contract made. A cannot plead in his defence that he was ready to

deliver at the distance of 10 miles the invoice distance of B Ce Rep 200

By 2 L then can he in a tender made after sent is brought seen in Bgh. Journal Stats have adopted the 2 C L rule: the general practice is to wait leave of the court to tender. Cro Ch. 264.

But suppose the place is settled the article is to be delivered on or before a certain day. Gent. this is the same as if it were to be paid on a certain day that is the last day. If however tender should not with tender before the certain day, a tender at the time of meeting would be good — The law will not suppose a man to be at home before the last day, so that a tender before that time but that tender he was absent is insufficient But if he be absent on the last day then will this be good. Cro Eliz. 72. 8 Cow. 17. 12 Mod 421.

But tender must not only be on the last day but on the most convenient part of the day. The last part of the day is the time appointed by law, yet this must be light enough to count the money — In case of collateral articles the must be time enough to measure or weigh it so that in this case the morning is as good as any time. Cro Jas. or Eliz. 1314

But the covenant was of the same nature point out a different time as pay? or the transfer of stock which must be from 10 to 12. and other cases which the tender must be made in office hours. 12 Mod. 530. Stra 777. Cro Eliz. 159

Not suffice a place is appointed the time fixed upon for the tender therein a tender at any reasonable time is suff. on the next day. If debtor do not meet he does with the article money. He must give notice to him that he will tender on such a day &c. Co Litt. 211. 1 Dyer 354. 8 Co 92.

I find no case allowing time in the morning when the day has been appointed. Quere it would be good in many cases.

If no day be appointed & place is fixed upon & the parties have to repair to meet there a tender there would be good 5 Co. 114. Cro Eliz. 11.

There is one question that has lately made some figure in Eng. town country, a bond is not assignable by law, so that no suit can be brought upon it in the name of the assignee, it must be in the name of the original obligee. But the practice has now been common in Eng. protected in a court of Eq. to a bond ~~abandoned for money~~ ~~x~~ transferred in ~~the nature~~ of a debt

~~it ought? Bond upon it in a bond~~ It is well settled that if A gives a bond to B for the pay^t of money & B assigns it to C & A is notified of the assignment the law will not protect him in paying the money to B.

But the question arises from this. A gives B living in Goshen a bond conditioned to pay money on a certain day or to deliver a certain quantity of iron or nails &c. B assigns the bond to C living in New Haven the question is to whom is the money to be tendered or the goods delivered? Now according to a rule already laid down it is not to be held to any inconvenience by the assignment of the bond: Therefore if it be to pay money it must be at Goshen on the day or have an agent there else A will be justified in paying the money to B. So too with the heavy articles I must appoint some place, not more inconvenient for A than Goshen, else A may deliver them to B at Goshen.

It is laid down by elementary writers that delivery must be to assignee at his place of residence, because able pr might be a bankrupt. But it is unreasonable that A pr should incur expense & trouble for nothing. I have seen no decision to support the position. If the assignee has an agt. & greatly convenient the delivery should doubtless be

1 Lib. 13
2 Kut 109.
Cro El. 108.

be to him.

The consequence of tender is that it discharges all him mortgages powers &c. not debt however, Tender in some cases not only discharges the orig. obligation, but vests the tenderer with a right to something which if not performed by the devee renders him liable. Thus in Cro Eq. 88. Y. Clay & Exelby. Deft. was possessed of a lease for years, the inheritance being Pltffs in consd. of a promise to pay a sum of money Deft. also promised to surrender to Pltff his lease on pay. Pltff tended & Deft did not surrender the lease. The court held albeit that Pltff by a pay. or a tender refusal would have acquired a right to the lease which Deft. did not surrender wou. make him liable But as Pltff here did not prove refusal as well as tender he failed. Cro Jas. 245. L. Ray. 688 Acc. to Lucas principles of Co. 79. 2 Roll 523. Cro Eliz. 255 1 Show. 129. 2 Saund. 206. 1 Brownlow 71. Cro Jas. 245. 2 Saund. 352. L. Ray. 964

The mode of pleading Tender. — You must plead that you tendered at the most convenient place & day appointed. Cro Jas. 123. 1 Salk. 624. Also that tender was refused if the tender were present. & if he were not present at the time, you must plead that you were ready but at the fact of his absence

That you were always ready & still are to tender.
1 Lev. 30. 2 Show. 143. The rule applies to a tender of money.

But if the tender were of a collateral article you have only to plead that you tendered in the most convenient part of the day.

With regard to one point in the tender of collateral articles there has been much dispute. A engages to deliver one of two things to B who is to have his choice of them. A must tender them both for till then obligee is not compellable to choose. Such was the point. Long. 14. But if A in tender one of two things without giving B his election between them a tender of either is a good defence.

Suppose Deft plead tender & issue to out traverse first & Pltff replies a re-bond demand then the issue is taken on the demand & it will not avail tender unless he show that he has acted the part of a faithful bailee.

Money tendered must be produced in court to substantiate the plea of tender; and a practice has obtained in England whether prevalent in this country I cannot say of bringing certain collateral articles into court & offering them to the plaintiff in lieu of money. The bailee

steps further cost & proceedings in court ag^st Deft. 7 v
the most of pleading tendered see Salk 22 2. 7 T.R. 137
7 Co. 10. 9 Co 77. Stra 576. 577 v. 4 Bl. 374

The next defence is ACCORD & Satisfaction
Accord is an ag^t to take up with something else by
way of pay^t than that ag^t agreed on by the parties
Satisfaction is the fulfillment of that ag^t. But
an accord without a satisfaction is no ag^t. i.e. the
ag^t must have been performed to avail a plea
and the performance must be actual, for notion
will avail. 1 Mod 69.

I have known an instance
however in which accord without satisfaction was
a good defence. A man who had some property but
could not sell it for money accosted with his wife
to give him lumber in lieu of the debt. He tendered
the boards & the tender refused. I informed the tenant
that it would be no defence. He however insisted
to satisfy him I plead the accord without the sat-
isfaction. I supposed the opposite counsel would
demur of course. If then I should lose its volume
he only waived the accord & then I obtained
a verdict. But even then I ought not to have
obtained judg^t. tho I did. My client has since
since told me that he knew the law better than
I did.

Yet at the common law satisfaction is not the sole bar yet the tender and refusal of the accord in some cases, damages for breach of, from is.

After

of part performance & tender of the rest will not suffice. There must be a satisfaction in fact. otherwise the accord is ex. & cannot be pleaded. Resp. Dig. 147. Sir T. Jones 6.

Second satisfaction is good bar in personal actions where damages only are recovered. In all actions which suppose a wrong done to arise as in trespass Detinue &c. Resolved Dic. Left out not only plead accord & tender but acceptance &c. otherwise the plea is bad. Hob. 178. 5 Mod. 86

In Eng however

that is an act of sess received. as when a debt grows merely out of a specialty, thus a single bill for pay. of money. So too a cov. with seal for pay. of money. To an acc. on this instrument accord & satisfaction cannot be pleaded. Why? Because in Eng parol proof cannot be admitted to prove pay. on specialty of this kind. This arises from the maxim unum quodque dissolvitur eo ligamine quo ligatum. — This I state to be the reason because on a bond having a condition the condition is no specialty. &c. State may be pleaded. In many states of satisfactorily in this regard is paid to the

the above rule for it has been decided that parol evidence is admissible in such cases to show payment & therefore a c.c. stat. also 1 Brownlow 134. Cro Car. 116. 9 Co. 78 b Co 44. Cro Jac. 188. 1 Roll 266.

If there are more defts than one a bar of acc. stat. by one of them is a bar for all. For a man cannot have but one satisfaction

But in real actions acc. & sat is no plea the reason that the right may be a ground to real property there a title cannot be conveyed except by deed. In such case however Eq. would grant relief. 2 Co. 1 9 Co 70. 79.

What are the qualities of a good accord?

You will sometimes find it laid down in elementary writers that it must be in full satisfaction of the orig. debt. From you would from that infer that it was not a complete & valid accord unless the satisfaction were as good & valuable as that debt. But this is a proposition that requires limitation. It is true that there must be a real duration for the accord or it is not a good plea: but the accord is good if there be anything to make the law remedy that the law terms a satisfaction. But when a man is sued for £100 & plds that he accorded to receive £10 in discharge of the debt, as in

consid^n for such an accession appears to the plaintiffs. But in a similar case where it appeared that B had agreed to receive a less sum than the orig^l debt because he apprehended that A would soon become bankrupt when the dist^n would probably be greater the security offered was held a suff^t consid^n & the defence was suff^t. e.g. Same. A went into B's house & forcibly took away certain chattels in which he was bound to B. B thereupon agreed with him that he would discount the debt if A would give them up. A appeared in court on the writ of D for the orig^l debt & pleaded the accord & sat^n but the court held that the plea was bad for there was no consid^n. Plow. 5. Yet where a man took away cattle & the latter told him that if he would drive them to a fair 3 miles distant he would not prosecute him for the orig^l debt, the plea was suff^t for the driving was a consid^n. 1 Roll 128. 4 Mod 88. Stra 426.

Yet it has been said that there must be a consideration as is valuable in the eye of the law and hence it has been held in 2 Wils 86. Preston v Christmas that a release upon a suff^t indem^ty was no consid^n. For an accord i.e. not a satisfaction for the original obligation whereby Def^t was bound to Plff. Such now is the Eng. law yet in our it is contra. An Eq^t of redemption in my opinion has as good a foundation

for an action as any other right & mean if it is a suff.t consid.n for an accord.

Again it appears to be said that the satisfaction must be worth something in a pecuniary point of view. Thus B calls A thief before a company of gentlemen. A thereupon brings an action. B agrees with him by way of accord & sat. to ask his pardon before the company. Doubt so. A sues him for slander. B pleads accord & sat. It will not hold. A for want of consid.n to it seems yet a g.d p. from would be a suff.t consid.n 1 Roll 128. In my opinion the former is the better satisfaction. 1 Mod. 128

Again the satisfaction may be certain. Many singular accords are stated in the books. As delivery of a quantity of what has been said to be voice for an entire. I correctly. I think for the quantity was not specified in the accord. The contract must always be a certain no tender will be suff.t this question was tried sometime ago when the court held that the satisfaction must not only be the duty but actually rec.d or it will be no bar. 1 Roll 129. Q Co. 79. Cro Eliz. 193. 310. 1 Mod 169. Hob 57. 5.

The Mode of pleading an accord & sat. was formerly thus. The Deff.t ought to be barred of an action, his act. because it was accorded & satisfaction him &

Defd. that if certain articles were delivered to them they should be rec.d in satisfaction of the debt &c." Pltffs to wn they were delivered & received. They now plead that he ought to be barred &c because certain articles were delivered to & rec.d in accord & sat. of the debt &c.

If sat. be rec.d before the time of delivery arrives the accord is no defence for the cr. that must be wch. &c.

It is a defence also in case of contracts that there has been no demand. But this is not universally true. There are several cases in which a plea of no demand would be unavailing.

Demand. (Fr. demander) is the calling on a man for the pay.t of a debt or the performance of a duty. 8 Rep. 153. It then appears that there are two kinds of demand, the one in deed or express as in a precipe quod reddat. the other in law or implied as in case of entry distrs. &c. Others have divided them into three also four written verbal & implied. 1 Ch. Pl. Abdgt. 630. 1 Lill. 432. The stat. of Lim. compels demand to be in writing within a given time.

Where a demand is necessary to support the Pltffs action it must always be specially alleged in the Decl.n. the usual clause "tho often" is not suff.

If a man promise that he will pay on demand, only note, it does not follow that the cred. must make a demand. But if there is no debt or duty till demand, demand is necessary. 1 Hill 482.

The gen. rule on this subject is, that there is no necessity of a demand in any case where the opposite party can discharge himself by a tender. Thus if promise to pay B £100 on demand, it shows as well as B that 1. i. to pay it that he can discharge himself by a tender. There is no necessity there of B's demanding it. By the phrase "On demand" is meant "within a reasonable time".

The rule of the contract indeed will often furnish the means of deciding this point. Thus if one contract to transport merchandise for a merchant in consid. of the discharge of a debt, there can be no tender of service suff. to discharge him. otherwise he might tender when the merchant was not ready, & thus receive the benefit without performing the duty. In this case therefore there must be a demand. Is a plea denying that fact would be good? So if a contract to build a house for B. 2 should come when B was not ready the tender would be ineffectual & hence a demand is necessary in such a case.

of the same nature are all durabilis given by merchants. they cannot discharge themselves by tendering goods, otherwise they might force upon the creditor some article that to him would be useless hence a demand is necessary in such cases tho if Pltff institute an action before demand a plea of no demand will bar it.

The case of corporations stands upon distinct grounds, a demand being indiscriminately necessary in all cases. The treasurer is supposed to be ignorant of the debts contracted as he does not make the contracts & the rule requires a demand in this case to secure the necessary information Jacs. Dic.

There are cases in which notice must be given but has the same effect as a demand, creating a debt & liability. Co Litt 390. Thus if I employ a man at a distance to do some particular business for me in the progress of a year, he after performing it must give me notice & then if I do not pay within a reasonable time I am liable. So also if one receives an order in satisfaction of a debt & it is not accepted, notice must be given to drawer before payee can sue him. In such cases plea of no notice would if sustained by proof bar the Pltffs action.

There are some cases which go on the ground of gen.l notoriety. Thus where a man bound himself to pay a sum of money to his nephew when he married. The nephew married & the money was not paid. Thereupon the uncle was sued, he pleaded want of notice. but the court held a marriage to be a matter of gen.l notoriety & that the uncle was bound at his peril to take notice of it. Sir W. Cont.) Cro. Car 34.5

If one be bound by an obl.n to do a thing for another, ent.r must give notice when he is to perform: but if one promise that a third person shall do it, then the ent.r is not bound to give the third party notice. for there is no privity of contract between them, but the party must procure notice at his peril. 2 Lill. Abr. 239.

It is also a rule that where the fact is such as to be equally within the knowledge of both parties, notice is unnecessary, but where this is not the case ent.r must give notice. Marsh. 156. Vno 239. Lat L 15.

Notice is not to be given to strike upon a cont. as upon a bond. Cro Jac. 391. – In case of a lease it has been adjudged that where a forfeiture is to be recovered notice is requisite, secus, where damages are to be recovered. 1 Burst. 12.

It has been held that a Deft having undertaken to do a thing undertakes to do all circumstances incident to the performance of it & that without express notice he is not ignorant of the thing to be done. 2 Bac. 143. Want of notice on various occasions has been the cause of suits agt. Sheriffs. It will not be material to be running on this subject as Bohuns Institutio Legalis & Jacobs dictionary under the head of Attachment

Another defence to actions instituted by creditors is Foreign Attachment. If a man absconds or leaves the country in which he resides & there are people in the same country who owe him or else have his property in their hands it is the object of foreign attachment to draw the property out of the hands of the latter to pay the debts of the former. In this way it becomes a complete defence for the absconding debtors in an action agt. them for the money thus recovered. 1 Bac 689

This mode of attaching the absconders goods in the hands of third persons originated from the custom of London. Formerly it appears to have been nothing more than the attachment of a foreigners goods to satisfy his creditors. Coutts 66. Bac. Dic. Att.

Foreign Attachments are made in this manner A owes B $100 & absconds i.e. leaves the country

B can find nothing on which to levy but C owes A. B knowing this fact takes out this writ of attachment agt. A. he leaves a copy at the last place of residence of A for the use of A. friends and sues with C to attach the debt which C. owes A. The cause as between B & A is continued for a reasonable time till A has a chance to return. Then if the court give judgt in favour of B agt A. C is bound to pay over the debt which he owes A. and this judgt. will in many cases of the country be found a bar to any action which A may bring agt. C. C is called garnishee & in most states he is allowed to make a defence for A. the proceedings being regulated by stat.

C is called garnishee because he has had garnishment or warning not to pay the money in his hands to A but to appear & answer to the Pltffs. suit. &c. &c.

The practice on this subject is different in the different states but the principle is the same in all. e.g. In Ct. for the garnishee state the recovered is divided among all the creditors of the absconder.

You observe that I have as yet treated only of a suit between A & B. the judgt. for B & against for payt. thereon by C. Let us now suppose that C refuses to pay after the judgt. declaring that he owes

of B then obtains a sci. fa. on the judg.t agt. A commanding him to show cause why the Plff should not have Exn. agt. him for the debt. B must do this the first and to trial by the writ court or A may appear & give bail to the attachment from writ issue. this is the custom of London.

For four days in Eng. must A go before he can be compelled to show cause &c.

Cis sued on the factor agt. Attl. under a debtor &c of A the alleg. which he may deny. Issue is taken upon the fact on which the parties go to trial. Cis liability then depends on the verdict. And hence it is to be observed that the law gives B the Plff a right to call on C the garnishee to answer as to the fact of his indebtedness to A. It has been questioned however whether C can wage his law unless B call upon him to do so. Sed. ha. can. Jac. Dic. "Attach." By the Eng law or custom Plff may hinder his wager of his law by producing two ref.t witnesses to swear that garnished either money or goods of A in his hands at the time of the attachment of which a sufficient writ is made & being filed his plea by way of estoppel. — C can give evidence of f. agt. A before the attachment under the gen.l issue.

C has no right to carry on the trial in defence of A in the suit between A & B

if he deny that he is A's debtor. The reason for which this writ of F. F. is issued is that an E. cannot be levied on a debt which is due E. yet if C owed A $100 worth of horse shoes &c. B might levy on them. — If C pay over without judg.t ag.t A he does it at his peril.

It is a gen.l rule that if C pay over to A after the att. ~~before judg.t~~ he must pay it a second time to B. But this must be a strict to a voluntary pay.t, for if C is obliged to pay by process of law he cannot be liable to B. To this however it is said that pay.t is in all cases voluntary as it might be resisted by an action of ejectment. but there is no good reason in this as it would put the party to great inconvenience for which he could have no remuneration. — If at the time of A's absconding the debt was in E. & C pays the money to save his property from being sold then he will not be accountable to B.

The debtor must come before and in a worse situation by the absconding of his cred.r thus if B. sues A a debtor payable on year hence B obtains a judg.t ag.t A. & the garnishee will not be obliged to pay B till the end of the year.

Again suppose B does not owe A money but owes A land or a horse. B is not obliged to pay B in money

the collateral article must be turned out an exec.tn
held at the port to discharge B's debt. C is not bound
to deliver them to B but B must bring an action
for the articles

If A commences an action agt. C pending the action
between B & C. the course of the court is to continue
the latter

Foreign att. is no defence in case of dam-
ages recovered agt. a party. but only in debt. the
writ cannot issue in slander except in the case of debt
of course it is no defence for action of tort. as battery
false imprisonment slander &c Neither is a defence
to Trover for A's right is not attachable. for C is liable
only, not indebted to A by the hypothesis in such
case. 1 Bac. 689.

A further defence is Payment of money or performance
of act collateral. This is a fulfillment of the con-
tract & consequently a discharge.

With respect to pay-
ment it always is of a sum of money. this is provable
either by parol or written evidence. Sometimes
it will be inferred merely from the lapse of time
since the contract made or obligation incurred

The mode of proving performance is different
in different cases. Admitting that a question of

fact arises, it is suff.t to state in pleading simply the performance. But when a question of law is involved Deft. must aver the quo modo with the fact & state how it was performed. as in case of an agreement to convey land. it will not be suff.t for Deft. to say qu.d that he conveyed, but the manner in which the contract was executed must be shewn & provided exhibition of the deed — & for this obvious reason that a question of law ought not to go to the jury but to the court. 7 T. Rep. 164. 184. 2 Bac. 43. 1 Mod 203. 408. 577. 1 Salk 124. 2 Ray. 986.

Another defence to actions is a bar of Prior jud.t or that the merits of the cause has been tried before. The qu.t rule on this subject is this. that when the evidence must be precisely the same in both actions a judg.t in one case will be a bar to an action in the other. When there is the same evidence there must of course be the same matter cause or thing. Thus if A take the horse of B. take him & case be sued in Trover. it is A for the price. B treating A as bailee or he may sue in Trover for damages. but B must be defeated in one action & can plead the judg.t in bar of the other, since every judg.t carries with it relief or absolute right.

But if the evidence is not the same a defeat in one action will not be fatal to another

& this is experienced every day in our courts. especially when a Pltff mistakes his remedy. e.g. A borrows a waggon of B refuses to return it. B brings trespass & fails. He then brings trover & recovers for the wrong in these two cases is not concurrent.

Many attempts have been made to make the defence of a former judg.t — It is a singular fact that the st. of Lim. bars all actions of trespass brought 3 years after the right of action accrued not does not bar trover at all which may be often brought for the same cause in which trespass is barred? tho the evidence is concurrent in the two cases. Then if the decisions on this subject be correct which I doubt is an instance in which a prior judg.t for the same cause would not bar an action. Edwards v. St. Lim. Esp. Dig. 164 Pall. & K. P. 49. 102. 6 Co.

Does the st. affect the action itself or only the form of the action? My own opinion is that the st. was meant to bar the right of action in every form whatever.

The next defence to be considered is insolvency. A discharge under the insolvent debtors act is a good plea. Esp. Dig. 165. But in such case deft. must shew that he was a person within the benefit of the act & that the discharge was regular. If answer cut to the

statute. ib. and. post Salk. 521.

It has of late been a unusual thing for persons in failing circumstances to notify their creditors through state advantage of the insolvent act. This is now done but when all the creditors agree to give up their full demands for so much in the pound when the debtor has thus paid to each his proportion the remnant of his fortune is reserved to himself sets him up again in the world as a new man. If after such a compromise he is sued by his creditors, he may plead in bar to the action the discharge thus given.

When an insolvent debtor has entered into such a compromise with all his creditors except one who privately stipulates with him to agree to the arrangement if debtor will give him his note of hand for a sum above his average proportion thus taking advantage of debtor's situation: then upon action brot. by that creditor on the note, debtor may avoid the contract as a fraud on third persons i.e. the other creditors. It is also as we have himself station the no fraud. cf decision in P. Rep. shows that C.L. courts can rescind such a contract, tho it is often said that Eq. only can afford relief. Evans Dom. Pol. 438. It is agreed that Eq. will set aside such a contract. I think the decision in P. Rep. correct.

The reason why a discharge will not be given after a night of action has accord is the observation that there must be a consideration. In this case there is no consideration.

Ld Coke often speaks of a discharge & a release as the same thing, either of them is a good defence both pleaded as an executed cause. A discharge properly so called is made by parol & before a right of action has accrued for breach of the promise. A release on the other hand cannot be made by parol and is given only when a right of action has accrued. Thus A contracts with B. to deliver 100 Bush. Wheat in 3 mos. Within 2 mos B by parol & without satisfaction discharges A. But on the other hand supposed A has failed to fulfill the contract when the 3 mos. elapsed. B's right of action has then accrued. B then may not by parol discharge him. but he can release him "ex ligamine quo ligatur" Cro. Ca. 383. 384. 2 Mod 44. 1 Ld. 205 1 Sid. 177. 297. Esp Dig. 167 also appears to confound them. A person may release any claim that he has.

A release formerly could be given by a man sealing without signing because the every man had a particular seal & the impression by that was equivalent to his signature. This has now become absolete so that sealing is not in dispensable. yet if there is no seal to a release it must be shown.

It has been made a question whether a release of all actions & demands should operate as a release of a debt in pras. solv. in fut. or any obligation, in fact any thing

at a future day. This in Co. Lit. 300. Tyrwhitt v. Bridges where suit was brot. on an oblign. to abide an award of arbitrators who had given Pltff £20 agst. Defdt. to be paid at Christ. & Defdt. 10th April preceding. Defdt obtained from Pltff a release of all actions & demands & this release Defdt. pld. in bar to the action. The obligation was a deb. in fut. solv. in fut. yet court held that the release was no bar to Pltffs action. no judgt. was given however. On this trial the following distinction was taken by J. Williams Abstr. a deb. in fut. is discharged by a release before the day of payt. But it is not so in case of an annuity, rent or in an actn. of debt for non performance of a wrd made for payt. of money at a day to come. A conclusion that it should be a release of every deb in presenti. Co Lit. 192.

And it is now pretty well established that a deb in fut. solv. in fut. is also included in a release of all demands. 2 Ld. 623.

But that which becomes a debt by mere relapse against is not released tho the thing out of which it springs was so at the time. A leases B a piece of land at £150 rent to be paid yearly. This would not be discharged by gent. words of release, tho it might by those which are special. for it is not a present debt

to be paid at a future period as it depends entirely on a subsequent event viz. enjoyment. On this point I agree with the division in 10 Co. 302. Sid vide Cro Eliz. 606. Cro Car. 487. 1 Lev. 141. 1 Salk 578.

It has been a question whether an interest is discharged by a release of the bond or note on which it is payable. thus a note or int. payable 1 year from date the note is released. I think the interest needs no appendage of the note that it follows the same course. a release of the one is a release of the other.

But a covt. to do a collateral act to be performed in future is not discharged by general words of release. This stands on distinct grounds from the case of money. General words of release only will discharge this. as a release of all covenants whereas a release of all demands more to not. Seers in case of money. Cro Car 179. Co Litt 292.

But what is not due is not discharged by a release for it is incident to the reversion. it grows out of the enjoyment of the land. it is real not personal, of ~~inh~~. But if due it may be discharged or barred by a release. for it is then personal property & goes to Ex.rs Not to the heir. But ~~not~~ due is an incorporeal hereditament. Cro Eliz. 606 Cro Car. 487. 1 Lev. 141. 1 Salk 578.

A contract of a higher nature if given for a lower one is a defence to a suit upon the lower contract. This depends on the principle. If the lower one is merged & swallowed up in the higher one it is a defence. But if the higher one be only given to enforce the lower. it is no defence to say that there exists a contract of a higher nature. vide "Contracts" Comyn p. 129. Bull. N.P. 157. Esp. Dig. 166 3 Bac. 124 2 T. Rep. 249. 1 Com. Ca. 219. Burr. p. 1 Bac. 19.

A release to one of a number of joint obligors or of joint & several obligors is a release to all. So too a release to one of several joint trespassers is to all. 2 Roll. 69.

There are cases in which a suit will lie in fact of proof to narrow the grounds of a release, not in order to show that there was any fraud, agreement or conversation between the parties as to narrowing the words used but to show facts from which it may be inferred that such instruments were not contemplated by the parties at the time of giving the release. Thus if A holds a bond against B for 100£ to be paid interest on the bond to be afterwards sued & B sets ~~this~~ A B takes a release from all claims & demands. A dies & his executor sues the bond. B pleads

the release in bar. The court admitted parol proof to show the facts & circumstances of the case from which it appeared that the bond was not contemplated at the time of giving the release & of course the plea overruled. To exclude such testimony would be to prevent A & B without, who has conspired to defraud B.

A gave note to B for $1000. A died leaving B a legacy of $5. B the Ex^r of A tendered the legacy & took a receipt in full of all demands. The court will admit parol proof to show that it was not B's intention to release the $1000. 1 Pow. 377. 392. 398. Smith. 143. 7 A. & E. 577. 9. L. Ry 236 336. 664. 2 Lev 237.

Discharge under the Bankrupt Laws is a defence. This discharges all debts due owing at the time the certificate was obtained but such as became payable afterwards. 1 Wils. 248. 7 J. Rep 103. Dougl 97. 4 T. Rep. 94.

It has been a question whether this discharge is to be considered as a judgt of court. If it be so it is a bar to an action brot in a different state on a debt due owing before the discharge for our constitution provides that a judgt in one state is a bar to an action of the same kind in

another state. It was formerly held in Conn to be the same as a proof of court. It has however been decided in N.York that a discharge under the bankrupt laws of one state is no defence to an action in another & this decision I think correct. See also 1 Ther Bl. 123. 136. Where it is held that confiscation of property in this country is in Eng no defence to an action on a debt originating in this country prior to the confiscation.

The next defence is that of DURESS. a contract or security obtained by duress is void. Duress is of 2 kinds. by minas & imprisonment.

Duress of imprisonment is when a man is deprived of liberty or the power of locomotion by illegal restraint until he sealed an obligation or the like 1 Bl. 136. In such he may allege the duress & avoid the void contract. And it is to be observed that it must either be unlawful or else an undue advantage must be taken of that which is lawful to extort more than is due. But if a man be lawfully imprisoned & written to procure his discharge or on any other fair account seals a bond or deed this is not duress he cannot avoid it 2 Inst. 482.

Duress per minas is either for fear of loss of life or else for fear of mayhem or loss of limb

or some other great bodily harm. 1 Bl. 131. What a contract was they estates is a good Def. in. Assum. But if the threatened damage in any case fall short of duress no relief can be had against a contract thus obtained but in Eq. Thus a fear of battery is no duress. nor if having our house burned or goods taken away & destroyed that fear of loss of life or limb of his wife or child is duress. the not of his fancy. So that in this case Eq will give relief. ought to relieve in other cases. Eq will rescind all such contracts by an extension & proper application of the same principle that courts of law act in a two limited manner. Rees D. R. 427. 1 P. Wms 115. 639 1 Bro Ch. 369. 2 Ch Ca. 160. 5. 18. 264. 3 P. Wms 28.

Now for fraud is a defence.

When there is fraud in the execution of a contract it renders the contract void. Thus a blind man intending to sign a bond for £5. is made to sign one for £50. he may plead non est factum.

But if the fraud is in the consideration it does not render the contract void at law, this if it be a contract of no great importance & be cognizable in Eq. it will then be relieved against. This distinction

is recognized in law. so that fraud either in the consideration or execution generally renders a contract void. But such a bill does not take cognizance of many contracts where if there be fraud in the consideration a court of law will not relieve against them. the injury must be without a defence. In such case the party injured may be entitled recover in damages. yet such damages are regulated in courts of law by the general value of the article not by the benefit that the party would have derived from it had there been no fraud in the case. Thus a gentleman has chosen a horse for $200 the seller having informed him that he is good carriage horse for which he, from knowing, knew it. he knows horses to be calculated only for the plough. to the buyer the horse knows of no value. He cannot file a bill in Eq. for this cognizance is not taken of such matters. He sues in Eq. courts. a jury pronounce the horse worth $160. i.e to the generality of mankind. then the purchaser recovers but $40. Many of you may live day see courts of law going on a more liberal principle & I hope the period is not far distant. Rivers D. R. 2 33.

The defence of arbitration or award extends to all personal claims. it is a decision by men chosen by the parties a domestic tribunal. It is a good bar to all pers.l claims either of tort or contract.

Awards cannot pass title to real estate as if two persons submitted their dispute to arbitrators. the award is not binding so as to confer the title. they may however make an agt. about it & enforce by means of a bond.

Not with respect to mov.l property it vests the title absolutely & enables them to maintain trespass or trover for it.

For if one claims his injured by battery slander or breach of contract & mere determine that of course pd. he can sue on the orig.l contract. original cause of action lies.

If it relates to a collateral matter as where a Bat. action lies if the party is disturbed in his lib.y

Why? one a power that bds. not exercise it. But bds. if the Party does not comply they inflict a penalty. the bd. of Ch.l mere carries the title unless the penalty is inflicted. In many States. Chancery has power to do it [illegible] etc.

"But not of persons interested not parties

Whereas arbitrators convey the title immediately

In b^r of law an interested person may testify by the consent of both parties.

& In b^k if one appeals to the conscience of another in most sacred a it will be treason for a coy^{ly}.* But arbitrators right out the truth according to their discretion

A court of law can never give a specific performance. but give damages in money. E^q can decree specific performance & arb^rs can not the title absolutely immediately

Where there is provision in the reservation the rule^s must be governed by law or E^q &c.

Pa is and being made bets an man & D^{ff}'s claims & as letting it in invalid and th. or in his favour a c^d bien. and the ob^n that a man may not to his old claims is now at an end. he must see on the award only

Law & law of contract & conveyancing this is true conveyance or title. but E^q enforces oblig^n conveyance. nonsuppress an award of tres-passing arbit. he knows nothing of the law or not. with the award.

Lapse in a short t.

where a person of money was assumed transcription by parol. without law.

Ni 8.7.8.1
Gt. Rey 248
960. 1039.

4 B & B 3 & 4. It delivers the arbitrators an title to hope by the selling. For but to make out go to not in fe turnd. Arbitrators cannot carry title thus but in all states which in prohibit sale, profit for turn this are yours [illegible] Chancery without more.

Arbitrators may award in the alternative if they please as to deliver up a certain horse or if he does not at such time to pay £100 if delivered by the time it satisfies the award if not £150 may be recovered. This cannot be done by bond.

Where a bond is given to abide the award you may sue on the bond or on the award. If the bond does not mention the award not given to satisfy that claim it was given before the award was made. The bond was given to enforce performance of the award. If it mention this is the case you may sue on the bond or award or covenant whichever it is.

The laws relating to arbitrations are entirely different from what they were in the days of Queen Elizabeth.

Funds that are arbitrators may be bound on the award has always remained the same. But if to bind on a specific collateral act it contents not be enforced. Submission was of course imperatory. The first alteration was if

5 Mod. 35.
1 Salk 74

then if there was any promise without consid.: it was suff.: still later however a mere submission was suff.: a consid.: being deemed implied

there was a sufficient to abide it could be enforced or if there was any consideration as a power to enforce it. Now if there is a mere agreement it is suff.t to bind to the award.

If the collateral act an award to be done infecting lands a court of eq.t will enforce it. But they do not interfere in disputes of personal property except in a few instances. & there are cases in which money does not replace the property as in case of a family picture.

If dispute were about performance of contract as to build a house or convey land they could award performance of collateral act. & it was said that a collateral act was to not to award. to satisfy a debtor as for an abuse for slander or battery or debt as to deliver up a bond or note or to cock fowls which no such contract exists. but now decided that it may be awarded unless guaranteed in the submission.

And it is said that the collateral act must be of some value so that knocking thing gives pardon was decided not good. I conceive however that if it was traveable & degradation to the party, it was consid.d & held to be suff.t a perfectly idle act or consid.n is not law.

If the power is to three to decide or majority of three

cannot decide it. i.e. two cannot determine it. if all are present two can make the award & this is plainly the intention. two alone however may make a valid award if so agreed in the submission.

Now it is a common thing to obtain a rule of court to decide the award when the parties have agd to submit. & then the court can enforce the award by fineing for contempt sometimes a bond is also taken. then the suit may be on the bond. the award on the party that will not perform the award may be committed for contempt. This practice of courts has been in the nature of bkt. & that was soon after received in all the states of the same nation to effect.

In Lon. however the award is entered as a verdict & judgt. rendered & Ex. immediately issues. when that will enforce the award. But that is not done in other states I believe. the only practice is to issue an attachment & commit the party who refused to abide the award.

Suppose A & B are rencting for 6 in a joint bond. 6 has failed. A & B submit to arbitrement to determine the proportions each should pay in case the bond the point.

An award is a decision of men selected by the parties to decide the dispute — Arbitrators are to be governed by the directions in the submission otherwise their powers are more extensive than that of Ct. of Ch. This award is a bar to a subsequent suit for the same thing. Thus for slander that is at law and after submission the same action will lie on the award. Other is the case with all personal disputes arising from contracts or torts, except in those cases where there is bond or any sealed instrument for a sum of money or judgt of courts, in which cases an award is no bar. If Arb. award nothing due still the party may pursue the cov. or bond if he has given a bond it will be forfeited if he does not it is no bar by the Engish.

Now if the same reason does not exist here this should not be law here. It is a maxim of Eng law that no evidence is suff. to discharge an obligation but that which is equally high with the dec. now an award is no more than a parol testimony or at any rate writing without seal

When a right of recovery accrues from something subsequent but from the bond or cov. itself it is always a bar, as where one gives a bond & cov. to pay that it shall be void if he builds a house for him within one year it shall be void. Parol evidence is given in evidence.

Payt.

could not be given in evidence some years ago to an action on

6 Co. 43. 1 Lev. 292
Cro Eliz. 422
Cro Car. 99.
1 Kib 937

on a bond. & now in Eng & almost every state a stat is adopted allowing pay to be given in evidence, so that the principle is done away & awards & bonds specially would be considered a bar.

An award can have no effect upon real property because there can be no conveyance of realty, realty by deed. Why then do you not sue before & ~~to~~ deliver the deed to arbitrator reason is that a freehold cannot be made to commence in future according to the old Eng maxim. In many states this maxim is either expressly or impliedly abolished. Where the maxim is in full force the law must remain.

Among the authorities we find it said that an award concerning real property is void but not so for the bond is good. Again we find it said again that it is good twice passes the land.

Another said the award would be good & pass the land if the reference was by deed but the deed cannot affect this.

The first decision which tells might come first says that an award of that kind does not pass the land but the bond is binding. Kid awards 39 & 40. See 1 Ld Ray 115.

There are certain things that cannot be arbitrated upon as all criminal matters and

formation and cases. these cannot be decided by courts of justice. & a bond given will not be binding. Refer to criminal & questions of divorce.

Pinch's case of a person whether fornicate or fornicator. or separation. Lady he cannot be arbitrated upon. but whether one is a bastard or not might I suppose, it cannot. see Kid

If a sum of money is awarded its creates a debt & is conclusive evidence, so long as it remains unpaid. that at the time so much was due you can make no enquiry as to the cause of the debt. & this award will support an action. and if there is a bond you may sue on either the award or bond. the bond does not swallow up the award.

Arbitrators have power to give specific remedy & will cast the property. or give an award that the horse be returned or the party pay so much.

The first method to enforce an award is to sue on the award. on either upon a con.ts 3d is by suing on the bond which is the usual way. 4th mode is by rule of court to be void if the award is kept. & 5th. The arbitrators may process of attorney before a magistrate & confess judgt. the judgt. is delivered to the arbitrators. & then the magistrate if bound the Ex.n immediately. & for any reason by arbitrating

It is a very common thing especially among merchants to enter into a covt. to submit to arbitrament whatever disputes may arise between them shall go to law. Hence a question has arisen whether if one of the parties break the covt. & bring an act. before waiting to arbit. the court can entertain such actn? It is hereon now settled that the courts cannot be ousted of their jurisdiction by any agreement whatever. 2 Ryde. 98. & T. Ep. 1 Ej

8.6.82

the judg.ts It is clear now that this practice is a very bad one. for the man is with an Ex. upon his back with no way in court. If a bond is not bad be given it could have come before some court it can be rectified if the award had been given by partial arbitrators.

When a submission is made a party can revoke the power of arbitrators, but the bond will be forfeited. or if no bond you may recover your damages & costs in a suit at law. it is absolutely an injury.

There has been a great improvement made of late. thus the parties apply for a rule of court & then if the award is not performed the party may be imprisoned as for contempt. There are certain qualities required in any award that it should be binding & to take advantage of these defects you apply to courts of law.

There are extrinsic causes as bribery corruption in jury. Every statute an application must be made to Eq. in Law however it is set aside by courts of law for extrinsic as well as intrinsic. Every stipulation to be done by arbitrators must be done if not whimsical.

A is a minor & B becomes bound that A shall abide the award. is this bond void. It is said the submission is void & the bond is of course. the premises are not true tho if they were the conclusion might be. his contracts are but voidable

8 6 8 8

1 Brewer . . 68
2 [illegible] 290

Deut. 218
3 Lev. 17.
Natch. 207.

1 Lev 216
1 Sam Dis. [illegible]
1 [illegible] 631

2 Mat 22.

If a submission is in writing, a revocation must be so also

A bond is given to abide the award should, might be given for the full amount? Our courts to the Belaire determined that the principle of chancery down bonds extended to this case altho the words in the stat. did not make this case.

Another question is what should be his damages. Clearly all that is equitably due all that he has lost — in a determined in Eng. that he recovers all, even his own lawyer's fees

Suppose instead of revoking the bond the party does not appeal nor sue within fifty days after the inventory and award. Is this in Eng. to be equivalent to a revocation.

The consequence of Ex submitting to arbitration any claim, against the Ex.tor? It will generally prove that they could submit at their peril if less were received than could have been recovered at law it is a loss, if more the Ex.tor lost it. But now it is questioned if it is certain that he should have these same rights as Executor & not be only protected by resorting to the remedy.

Questioned if one partner should submit a claim to a bilement in the other partner because is that he cannot claim any thing of the other partner? One partner has no right power to submit to arbitr.

Sign 216

Sign 224

Sign 223

When one binds himself by attorney he is concluded by the act provided the act had power so to do. But the act in ~~which~~ case cannot submit to an arbitrament without rule of court. If he does & binds himself as a party the act would be bound but the client for an act in case cannot bind his client without authority for the purpose.

Lapham a case of seed

claim with as witness of a bright & one or two be-
come bound when all agreed to submit to the
arbitrament question is are the others bound by that
bond i.e. ~~are~~ the others sign as attorney - the
parson were called in acting for the rest. Rid. 245.

Two men jointly submitted to arbitrament & gave
separate bonds. the interest was joint. was the person
who received the award entitled to the full award as
his sent on one bond or must he give both and receive
half on each. Decided that he can receive the whole
sum either. the in case law only one satisfaction made
is liable to the extent of the award by submission

The power of a husband
to submit respecting the wife's property if it were such
property as he as guardian & trustee of at the marri-
age. this includes all personal chattels & as regards
such property she is bound by his submission & if he
should die & an award be made. she is bound as shown

But that property over which he has not control will not be bound by such an act. as prest. property to be separate use. So are necessity. & the rents when paid in belongs to him.

Jenn case says that if the wife joined with him she would be bound but this is not so for she is supposed to be under the control of her husband. the conveyance of land is an exception to the gen. rule. 1 Roll. 267.

You will find it laid down in the books that if there was an award agt. a h. who dies before recovery upon the award, no action of debt ~~or pt.~~ could be brot. agt. the ex. but it is not so now. It is supposed that in debt upon an specialty, Deft. might wage his law & discharge himself when his ex. could not. but all done away 2 Wms. 269. Cro. Eliz. 600. 1 Lev. 248. & an action will lie agt. the ex.

Women be arbitrators. About any, persons may that the parties chose. but insane non compos. infants drafts & drunk. & all those that are under the control of others as slaves minors where the law presumes a bias. & allowance of treason but denied. & it is said that a man may be arbitrator in his own case if the party chooses him. — Cro. 218. 4 Mod. 226. Sandys. 43.

An umpire is a judge to decide when the arbitrators disagree. The parties may choose the umpire or the arbitrators may choose one. Arbitrators must use sound discretion but choose by chance as by throwing up a sixpence it avoids the award.

At first awards were void if possible afterwards they were established that would be established & then commence, & equal into the matter so that we have three sets of cases. 2 Burr 100. Rid. 47.

If arbt. mak. no award within the time limited but thro the business of the umpire may make an award within the same time. 2 Keb 263 332. T. Jones 168.

Due notice were the cases in which arbitrators may appoint an umpire. Party may appoint an umpire any time. Rid. 57. So also where further time is given. Ro. Abr. 263 R. Ray 295. 1 Salk 71 1 Ld Ray. 671. 2 Str. Ep 645.

After settled that arbitrators might appoint one question arose could they nominate a second the first having expired. were settled they can. 1 Salk 70. 2 Vent. 113. 1 Ld Ray 322.

It is the business of parties to have the award made & for the arbrs to appoint time & place of hearing & then notice is given to the other party under the

If the parties prolong the time & not alter the bond the bond is void & the award only is the ground of action. i.e. an award made after the time set in the bond cannot be enforced by a suit on the bond. such a suit must be determined from the bond. the award not being made the bond is of no force. See 3 Div. Rep 592. note b.

Barnes 6th Ed.

hand of the Arbit. The Arbt. may adjourn from time to time. If the parties may prolong the time for the award & the court will sometimes enlarge the submission is by rule of court.

1 Ca. Eq. 87. 3 Ch.

It is said that if one party does not come the other may go on & the arbt. make a binding award. This is the only case of the kind. or question

Suppose arbt. decide part case this calls on an umpire to settle the rest Yid. 57. 58. 61. 1 Salk. 70. It is decided that they cannot legally it is done continually these cases when it is decided that they cannot it must be where there is to be a gen'l balance.

of the Difference

is to be settled by 3 or any two of them. if one was absent towards rots Mar. formerly held that no award could be made but now held that two may make the award under such submission. It is decided that under the word "delivered" implied writing or speech is so of "ready to be delivered" Yid. 39. 45. 6 Mod. 160.

It appears to be a rule among arbt. if ment. disputes are submitted the award is still to be made in one day.

A Arbitrator can recover the power of doing a ministerial act after the award made but not a judicial act. so they could not judge the matter over on upon new evidence after the time limited. But the remedies of

some ministerial act they may do, as to measure the outside to determine the amount of the [illegible] the quantum being determined, nothing being to be done but receive it.

But if they should issue patent for some matter not mentioned in the act it would be void; if the commission only so, it is the power of jurisdiction. 7 Co. Rep. Sept. 21. Cro. Car. 315. Palmer 119. 146. Hard. 13.

You have no authority to delegate power to any body. Suppose the act that such a board should be given, such as commissioners should issue, no such act as should be taken. There are many ministerial acts, such of course good. To that subscription any one and the substance of this is to be done, suppose to another the manner of its being done. 2 Salk. 591. 597. 1 Salk. 73. Stardis 171. 1 Lev. 358. 2 Stra. 1025.

In this case the act must be made out. The subscription is divided into two branches. The first is authority to decide concerning any thing not in the subscription. 2d. It should be of all that is contained in it. It does not follow of course that an act containing other matters is void as if it contains anything unto, is it of course good.

As to the first branch of the rule. Either from if all act is void, subject to it

commenced. we think being specific not cause of action but words mean include all demands causes of action disputes to matter if could not include mere a cause of action

It has been disputed whether arbitration could decide that a court of law. i.e. give anything but a money. but decided this case. 2 L. Ray. 1139. 6 Mod 201. Judgment was given upon this giving satisfaction in a collateral state. the question then is stated 1 Ld. R. 12. Kid. 99

Formerly every thing was supposed to be submission that was in dispute at the time of the submission. so no costs could be awarded but now done away. Arbitrators can award any appendage as costs. for they can award that A shall give B a bond payable 6 months hence. any foolish appendage does not affect the award.

Matter the submission does not wholly include the question disputable yet if the arbitrators decide the question it is good. no dispute as to whether tithes were payable on certain lands. the question submitted was what tithes were due. they decide the matter was not tithable. that award will bar any future action of that kind for all time.

If parties dispute as to their claims they could also bring to arbitrators. they may award or dispute according to the division & as sign claims accordingly

between Master & Apr. reason not obvious. but the rules settled. Submission of all matter of difference between the parties in the cause. including disputes. but it was said if it were all matter of difference in the cause between the parties referred only to that particular suit. yet I can give the interpretation the same in both cases.

By the 6th rule mentioning at the bottom of reference will not be awarded. but now it can 'Kid Ap. when bond given since sub mission was ordered to be given up.

Formerly bd if an award a clause to be given up in pursuance to be of all matters previous to submission it would be void altogether. It would cut off all claims originating since the submission but it is not so now. unless the parties shew that there have been such dealings or the court will not void the award. The courts have gone further & say that if a clause is awarded the award is good this complied with if it includes all matters previous to the submission

It was said that an award must not extend to any concern of strangers. but merely on that ground it is not now void. if a good reason for it is given it will do. the 6 & 8 rules ~~this~~ the same

that B should convey to A. his wife whereupon the
fee. 5 Co. 74.

So where award was that B should pay
a sum of money to the use of A. 1 Lev. Ray. 123.
So often held that it is good to avoid their right to
one ALL. So where all the submit their dispute
all to the award to be B. to a stranger by verb. K. 1105
Cro. Car. 541. 1 Mod. 9. So as to the prohibition that
children should pay towards the maintenance of parents
Cro. Car. 074. 74

But we find the award is that something
shall be done by mutual engagement. to avoid that shall
give B. a bond it is good. but suppose that it
were that A shall with 6 give B the bond, this
is void. that is that fact of it entirely. unless
A has it in his power by contract perhaps, to
compel B to execute the award. with under
obligation to sign a bond. a written contract to convey
land 10 Co. 131. 1 Lev. Ray. 123. Rich. 165. 5 T. Rep. 74.

When the award was to make a release of all all claims what
effect that has upon a thing held in right of another
or as trustee. by leaving the legal title. cing. no doubt
but it did release the trust property. but now decided
that in Eq. under trust will be protected. but it does
not appear to be a bona fide. but upon the face of it.
now can parol proof be admitted to show the

trustee had no beneficial interest in the bond. Now it always was true that a trust might be proved by parol. The agt., to its existence can be proved by parol. But you can prove facts which go to establish the facts which for a perfect interest be attest upon a bond might be shown as well as in anything else. A & B submit a specific claim as concerning a battery. They have other cause that is not submitted. B is ordered to pay some bds to release all demands. Now it is not of course of avoid the burden of proof to show the void in consequence upon of other demands. Is for him wishing to set it aside.

The 2d branch the award must be of all facts submitted. As if it were of all personal actions & the award spoke only of personal actions. Might it was bad. But not so now. 8 Co. 98. There might have been no real action but B. before there. Either is known. Bishop of all suits & debts decide only on one suit. It is good unless shown to have been more. Brought forward. Co. Eliz. 858.

Controversies are often specifically named & only part is brought forward & decided as nelson for battery slander on a bond. But it appears not decided but the battery. It is good provided nothing else was brought forward. But if there is one it must. Provided the

If only one matter is decided it is not to be to the other big news upon

the award is made in the premises when all the claims must be noticed & by specifically named.

Suppose the submission ~~not~~ does not specify but refer matters from of all controversies & an it an award. - how can the dispute be known? it is decided that the award is good of one cause if no other is bad before time. 8 Co. 78. Cro Jac. 201. 255. 1 Burr. 274. Cro Eliz. 216. Andrews 311. Comb. Rep. 547. Ria. 114. 117. 121. Hob. 87. The quantity may be proved by parol. the presumption of law is that only one controversy. 1 Vern. 735. If will declare they will decide on one of the controversies and is the award cannot be good.

Suppose specific controversies & an it an award the award includes all specified & some others also is the award void in toto it depends upon the manner of making it if they separate the sums to be paid on the bond for the penalties & for the betting & then $100 for one that not included in the award is good as to all but the bond. but if a gen. bond was struck by effect the award is bad in toto. so it is void if it effects the other things in the award it is void otherwise not.

Requisites of an Award

1st requisite is that the award must be legal. It is well else - any thing that will render a contract void will render an award void. You are not to understand that if an award is made upon something from which nothing could be recovered at law. it is of course void. if an illegal contract with lying to the law. to Pltff who award for the award is void. although not B could be recovered at law.

2d Requisite is that the award be possible in the nature of things. - For upon a mortgage to B. B covenants to C. & redeems & brings his bill for conveyance C will order a conveyance & get a penalty if he doesn't. for tho' if one attempts to convey land & then has a better title later priver conveys it to another bill will order a conveyance tho a ct. of law would not. he must reacquire the title if possible if not pay the penalty - So that an impossibility if brought on by the party is no excuse.

3d An award must be void to secure it is unnecessarily to order a bond by one & another not under the ct. forbidden. so to prevent suits to Pltff satisfaction is void. So to award one shall serve the other by work on his farm. not on ac't of any corporal but because it deprived him of person & liberty

2 and 29

2 Ch. Coy 1675

Ind. 59.
Rol. 133

it was trustee. B has beneficial int. B & C submitted to Arbitr. who awarded it in favour of C. Can C in the interest of B had legal title. Arbitrator B could in his of C & C could convey a legal title or if contrary to intent of parties it the court would give judgment according to the merits of B's appl. Litt. 2 Mod 314

Pl.

An award must be certain. This controversy was litigated & B will pay for B services. Arbitr. said he should but did not say how much. Cf. a decree or bill at the amt of it. If an award to deliver a bank general bond. This was declared too uncertain. If however you can from the circumstances infer the intention certainly it is enough. C claimed title to B's use & B claimed it also. A butt scaffolding. Award. belongs to B & the scaffolding to be pulled down. said to be yours as the intention was manifest. Cotton & Sutton Adam. Nor is an award uncertain because conditional. As that A shall have thereof if he pays mts otherwise not. A lot uncertain because in the alternative. 2 Lev 838. 12 Mod 256

If no time is fixed it is like a contract payable instanter or within a reasonable time. If it is money you must seek out the creditor.

Uncertainty may be helped out by comment

Palmer 110

as to bills of cost must be free. but when you have standard to resort to ~~determine~~ the obscurity the award is void.

5th An award must be free as to the controversies 6 Mod. 232. Ro. 142. Bro 62 an award that I suffer Nonsuit not final but retraxit was final. An award that all suits shall cease. 6th rend. nonsuit from 1 Mod. 33. 2 Ro. Rep. 614. 2 Stra 1024 effect however only to the actions. An award that a foreboundment run the bond was cause it to be rend void for final two rents could after arise on it. It is final when awarded to pay at future day 2 Stra 1082.

The award must be mutual. or advantageous to both. The idea once was that something must be awarded on each side. but if you can understand that would be in satisfaction it is suff. to answer the rule.

As to avoiding good in part the part void. is where avoid part vitiates the whole.

The old idea universally was that if part was void the whole was void. but this rule being very inconvenient the 6th vent clear over established all but that which was void. but matter is now the rule

Suppose A & B have claims. B is awarded to pay $100 collateral acts. all this is proper - respecting the matter submitted. but Arbitrators go on & decide something beyond their power as not submitted or illegal or impossible. this part only is void.

The submission is fair under the award is of a sum of money & also something else & gives a water not owned by him. A sues Pltff. if he will accept of the good part to wit "to pay $100" B is bound by it. So to recover a penalty if A will accept without penalty.

Suppose Defdt is willing to perform the void part is Pltff bound to accept the award is good & Pltff cannot complain. he must accept.

Suppose the award be of matters within and without the submission. clearly void as to that part without the submission but the good part stands if not connected with the void & not so as not to be separated as by striking balance. Where the party cannot get that intended to be given that is where the mutuality is destroyed. It is all void unless the mutuality can be restored.

A is ordered to pay $100 for a piece of land & that B convey the land to A & B's wife as to the wife void formally but B persuades his wife to sign the deed & then it the award is good

In all cases then in which the party will performe the void part which is intended on one equivalent the mutuality is restored & the award then made good.

Again if an award be by B & C in pursuance of a submission of A & B to give C a release of all his debts it is said that at the time of making the award the part relating to release was void because the award when retained had any effect of a release from B. — Authorities as to awards void in part. 2 Roll Abr. 46. 2 Lev. 6. 3 Bro Jac 584 639. 1 Salk. 98. 2 Saund. 293. 6 Bro Jac. 352. 1 Ld Raym 14.

Formerly made merely in the form of the award from the with a inclination to confirm awards, but now no precise form is necessary it must only be intelligible Barns Abty. 56

Formerly it must have been performed literally. but now it is suff^t if it be substantially performed. 1 Ch. Ca. 36 6 Mod 34 an acceptance of performance in a manner diff^t from that contract binds the party from saying there has been no performance. Pl. Cas 16 p

If no time is set for performance or pay^t it is due & payable immediately. the award with the very cause of action he might sue on it at any

Stria 103.

distance of time between this is the case or trusts will be good at any distance of time the party could not insist to his orig. cause of action & the award is a debt.

A is an was that
A & B make a bar & B pay the mt. the bar was made & B covt to pay the mt. this covt comes in lieu of the subscription bond & the state of things was thus changed. the award was fulfilled & no suit would lie on the subscription bond if B did not pay the mt at the time for an award to give a bond payable 6 mos hence by giving the bond thus payable the award was kept & no action lies on the bond of subscription if payt is not made on that bond at the end of 6 months.

Remedies on an award. If no other remedy than the subscription in writing or by parol in promise or bond. except the implied promise debt or indebitatus asst lies upon the award in the circ. state there was a controversy. the subscription to A & B. mutually chosen that they took it upon them to decide, hard chosen & time that they did decide that you should recover this money & that this award has not been performed. state this & time raise the promise.

1 Kab. 414
2 Kab. 156

If there was a promise to raise state it in the same manner or state that he refused to promise.

If the award was to perform a collateral act your action is bar stating these facts & averring that the award has not been performed.

If the award were that A & his wife should convey state that you ~~accepted~~ offered to accept & the deeds where & aver that he refused for the award as it was to the wife of A was void & would be certainly a bar & an breach as it was void & would prevent recovery.

If the suit is on a bond. Pltff does not notice the award. The Deft prays oyer & pleads no award. Pltff cannot insist "an award" because Deft may mean only that the award was not legal which must not be offered to the jury. Pltff then must set forth the award & assign a breach. The Deft demurs & judgt is had. If no award however the Deft instead of demurring rejoins "no award" which is not equivocal as it was in the plea. — If a time was set in the bond the Deft rejoins no award within the time set. If instead of this rejoining should rejoin performance it would be a departure & good ground of demurrer.

When Pltff replies sets forth the bar and he must state all the provisions in the submission 6 co Rep. 278. 2 Mod 97.

It does not follow of course that Pltff holds in all cases over performance of his part of the award. If however the Pltff is to do something, first it is a condition precedent to any rights of action aft. Pltff shew must aver performance. & he must also state performance of his part when part of it is void as for a deed to be made by Defendant's wife.

If the action is on the award Deft. may, if he relies on a variance between the award & Deft., set forth the award & demur saying Pltff. Dec. is insufft. as the true award is made part of Deft. (small variances are not noticed) & if the award appears when produced in evidence, to be different any issue as will exhibit non aft. will give you a chance to take advantage of it. If you did not execute the bond, plead qnt. tunc & then show anything which goes to substantiate it as no submission &c.

Act. on bond. Deft. prays oyer spreads the cond. pleads no award. Pltff replies & spreads the award upon the record. Deft. replies on a other grounds no award &c

find an award yet Plff cannot have judgt. for he assigned no breach. a assigning a breach indispensable. Kid 192.

If the award is in the alternative one part ill & one part good. Plff must reply a breach by averring non performance of either.

Provided to write to a money sometimes it is necessary to give notice. & it depends upon the nature of the award. - & on mutual discretion. If the award is to pay a sum of money no mention of a demand. But if the act was collateral the demand is in most instances to be made. - If the award is to build a house it is not bound to build until he had notice because B could not discharge himself by under the nature of the case determine it. & might it be perhaps with his time &c. So if a bond with contracts with A to do all business in his line of business for three years &c. notice must be given. i.e. — Suppose the contract of this kind a covenant between a Merchant & farmer the latter is awarded to transport $ etc. with the farmer cannot discharge himself by trading so the farmer must have notice.

If the award is in alternative a breach must be assigned in both.

Suppose an action on bond. Defdt prays oyer & reads the condition on the record & shows performance. Pltff may not then assign a breach because Defdt acknowledges the award & that he is liable if he has not performed it. — If the performance involves a question of law Defdt must plead the special mode of performance as in covenant &c. —

I know of no state that has a stat. of limitations agst recovery on an award. nowhere.

Suppose Defdt means to rely on the fact that the award did not include all the disputes submitted. Defdt after oyer &c. pleads no award in the issue & the submission mentioned a dispute about trespass. & under £20 bond. yet the award mentioned only a bond. — Pltff has cause of demurrer. but must set out in replication that the two other matters came before the arbitrators & they refused to make an award on them unless there was an item good. Pltff issues joined is found. If Defdt relies on no legal award he at once spreads the whole case on the record & saves an action. Pltff their demurrer.

1 Stra. 695.

3 P. Wms. 189

1 Atk. 74

Suppose an action on bond & defts attorney pleads no award. Pltff replies that ~~the~~ time was not arranged but says that before the time for opening the award Defts revoked the submission 8 Co. 81

When the submission is made a rule of court an action will lie on the bond, on the award and get an attachment from the court but Pltff may have both one & recovery. Nutt. 191.

When a right is submitted to a stranger & the arbitrator award the right belongs to a stranger if bonds are given that right must be interrupted before a suit would lie on the bond, nor an attachment issue. There is an advantage in making such submission a rule of court no action will lie on this award but it goes to the court & is pursued like a verdict.

But if you have not this advantage & find that the arbitrator will do so. Pltff will in vain specifically or in general damages for a conveyance of the right of water. Pltff will not usually interpose in enforcing awards of performance in specie unless include the submission was made of this or a court action or preference will be in favor of a voluntary submission or rule of court.

Ch J will inform an award on the implied agst as I think

36 ha Rep

2 Kim 24

3 Mm 187

2 Ld 315

2 Vd 14

3 Ett 541

2 Kim 21

You will remember that an attachment will not be issued until to applied for within a certain time. Ch. sometimes interpose where other courts will not because this time has elapsed.

An award was made thing acquiesced in, the defeated Ch. would not let it be enforced. 1 Ch. Ref. 46

Where an award is illegal the remedy against it is in courts of law. But there are cases in which the only remedy is in Ch. only in Eq. As if the dispute were downright bribery the award still good at law. Other Eq practice is pursued in most states. the appl. being always to set aside the award for intrinsic defects.

Where the submission is by rule of court, you need not go to Ch. a court of law will set it aside. 2 Salk 396. Where there is any undue partiality Ch. will set it aside (2 Vern. 515.) private conference with one party, (decided by Lord Hale. 2 Vern. 285) The diff. arbitrators wanted to award diff. terms Ch. would not again. as they had power the appointed an umpire. 2 Vern. 481. the umpire received to tell before parties bowmen would be given. the umpire decided in which was much more than the

highest arb.: the case was strange & left out the umpirage aside. Another case 3 P. Wms 310 63
2 Vez 316. 2 Vez. 214. One paid all the fees before the award was made. 2 Barnardiston 463 the C. set it aside from policy. The award was in favour of one who was a debtor of the arb.: if their debts would have been lost if decree against the debtor after the cargo was taken by the arb.: 2 Vez 151. this was set aside for same policy.
A paper was refreshed which would not of itself set aside the award. 1 Atk 797 yet one arb. sworn the award would have been otherwise

Ch. will not interfere for defects intrinsic but refer you to courts of law.

When the arb.: have made a mistake of fact on the face of the award it may be rectified if it were a mistake in fact than mere verbal doubt or a miscalculation &c. & they will also set mistakes of law made upon their own principles. C. does not [illegible] decisions merely because contrary to [illegible]. but if they have made a mistake according to their own principles. As when the arb.: determined to divide property in certain proportions and then took the wrong terms or dealt to me in the division. this is a mistake upon their own principles which they have adopted 3 Atk 424 2 Vern. 157.

But if $100 should be awarded for changing a wall the with they the courts will not correct it tho bad law —

An award is pleadable in bar of action for the any cause of action in all substantial matters bond is the only exception for it may be pleaded in bar of a bond.

In pleading you must only state the nature of the award if you are to do something first state it in your plea i.e. when it is a condition precedent. & when the award is void you must aver performance of your part.

There are cases in which a stranger to an award may plead it under a common law has injured A & B. Assume B & then opt to do a civil award of $100 If he attorney seems to be may plead the award in bar on the ground that A has satisfaction & the court have but one such trial after is bound to pay the whole

B partners cattle for 6 they mistake on A & cause B pays A an award or 6 &c. or simply an discount if then A sues B. he may plead the satisfaction in law. Com Rep. 328.

A & B submit to arb. & the arb. themselves to submit. & before mutting down award B for the same thing. It has been said that B

can plead the subrogation as a transfer of the ~~texts~~ notes to it in defence, although has forfeited his bond the notes usefully yet it is clearly a revocation & has the effect of a revocation.—

You cannot resort to orig. cause of action after answer. tho it was that you could formerly

Action of Debt July 1817

Orig. debt was invoked as a sense of money due by some express contract. bond. note. a special bargain. no matter what form it was in whether parol or written or made use of. if the sense was express & contract express. but now it is enough if there has been a contract concerning it & there is a standard by which it may be ascertained. as if you buy 10 yds of cloth at 2 $ p. yard. for now it is if you purchase without express agt. as to price. for you can apply to the market price. Esp Dig. 1 / 2. 313 Doug. 6 1 Atk. 231. 550

Orig. when the contract is implied & the sum not ascertained by express contract debt would not lie. for there is no indebitatus without privity of contract. as if money were found. agt. will lie for it. but debt will not. so that Indeb. agt. will lie where debt will not. for when money had been acquired wrongfully by mistake. deceit debt does not lie. but indeb. agt. will. for debt there must be a contract.

This action of debt is never now used upon a bare promise as notes &c. the wager of law has done away. Affr was given to do away this wager of law in Ass^n. Def^t is charged with fraud & cheating which was to prevent the wager which was equiv. bad to a verdict. Debt is now brot. on specialties for here there is no wagering of law.

In act^n of debt the rule always was that the whole sum must be recovered if anything. It is not so now but may be recovered tho' less than demanded. This rule arose from this that parol proof could be admitted given pay^t on a bond Doug. 6. 7 13. note 1 Atk. Bl. 249. 550. But now part may be proved to ascertain the amount to be recovered see rule. 1 Dyer. 219.

Owing to this rule debt on parol contract would not lie agt. Ex^r. because he could not wager his law. Debt lies for services rendered.

It is not in all cases where a sum certain is to be recovered that debt lies is the proper action thus A promises to pay a debt due from B to C he is not in any sense the debtor. A is a collateral promisor. Suppose B dies and exr. of A. B attaches. Is the promise to pay the debt to him. If he will release his bond. debt is not the proper action agt. A. he is not the debtor. credit was not given him.

2 D. Reg. 442

3 Ep. D. 178

Debt accrues when damages are to be recovered 1 Sir. Rep. 442
exp. it will not lie on a contract to do an executed act
as to build a house, but when they have been ascertained a
prop. debt will lie

If A promises B to pay him a debt due from C. debt does not lie. because A never was the right debtor credit is not given to C. But if C takes goods to A at the time says let C have the goods I will pay you B having no power to let C have them or his same credit. here A's right debtor credit was given to him & not to C. so that debt lies against A.

A draws a bill in favour of B upon C. it is indorsed over to D & E. C pursuant to C dishonours it. B may sue either the drawer or any indorser he cannot however sue A in debt but action is founded of contract between himself & D. E may sue him in debt. but he can sue no other in debt because he had no privity of contract with him. 1 Clark 23.

The drawer is said to be liable in debt but to no one but B with whom he holds privity. — There are cases in which debt lies where no privity. in one a penal statute. the lawyers say however that by accepting the benefit of a contract he impliedly consents to obey the laws the truth is however that it is an exception to the gen. rule requiring contracts to found debt. so to this action on a stat. not generally is against gen. ignorance as made as will debt. but it is no other case will debt in the gen. ignorance to sup. part of debt.

debt on proof will not lie if Def^t is committed on
a ca. which he is in prison. Imprisonment is satis-
faction only for the time that Def^t is imprisoned.
It has been said that if Plf^f lets him go voluntarily
the debt is discharged. (By Lee Mine. this is not
so) If you take a man into prison it is good but the debt
is gone if no security is taken. The rule was that a
Deff. should not be suffered to escape either a voluntary
escape. it was a punishment on the Deff. afterwards it
became transferred to Plff wrongfully. every voluntary
escape is said to be a discharge therefore if Plff
let him go it is a voluntary escape of course a dis-
charge. A release without satisfaction is good for nothing
but if you discharge one joint debtor from prison
the other is discharged. say the lawyers there is no satis-
faction except in money. the authorities are that a re-
cover is a discharge of the debt. & a discharge of one
is a release of both. 1 T. Rep 557 6 T. Rep. 525. Yelv. 420
8 T. Rep. 120 3 Wils. 12. 5 Burr. 2482. If you may
discharge in point a recovery on the debt remains against Def^t
or himself.

debt lies on judgt. But you can have ex. & it is said that debt will not lie until the year & day is out. For taking out ex. & this was my opinion but afterwards on which ante: pt. for not waiting a year & a day in Eng. so that it seems to be a common rule running with ex. - but should be allowed to force execution. I no it was determined (Stra 923. Smith 30. 1 Sid. 351.) in our national court 2 Bac. 362. Bro. Ab. 364. 6 Mod 288 1 Roll 59. 7 T. Rep 65. 2 Bac. 14. [illegible] to pay A. [illegible] Lo also debt lies where there is an account to pay some entire,

The action of debt founded on common judgt will always be maintained the reason is not that you might be non-suited upon such judgt but you cannot attack an erroneous judgt in this collateral manner - judgt must be set aside by writ of error or new trial & such judgt cannot be founded on a void or aside R Bac 211. 7 T. Rep 455 3 Wils. 348. (6 Ld 142) or until actually reversed

A question of some importance has been agitated in this state upon a foreign judgt in the state where rendered in court of competent jurisdiction you cannot have it set aside or wrong in any way except by writ of error or new trial. - A foreign judgt. in Eng. is then only a simple assumpsit debt. & if debt is brought upon it

Story 1
Dig. Ex. Dec. 410

Further says J. Ellen. I think it should be treated as a domestic judgt. in consideration of the nature & object of our federal union & compact from the respect due to each other's courts without reference to the constitution which I think to be decisive on this point. —

I doubt the policy of the rule which considers a foreign judgt. only as a prima facie evidence of a debt because it would be more correctly decided when the judgt. was rendered

on it you may prove it ought not to have been rendered. Now ought a judgt. rendered in N York to be considered in Conn. as a foreign judgt. or as a judgt. rendered in Conn. I should think the constitution settles the question that it is the same as a domestic judgt. In 5 States out of 8 it has been so determined in Conn for one of the five I speak of proceedings in quest as to any C.L. judgs. The question ought to be settled by the U.S. courts.

So if the majority's decision is correct when debt is brot. in that manner you cannot go into the orig. cause of action.

A foreign judgt. is prima facie evidence of debt over that ackt. or it must be case 5 Ha 1090 but not so now. You need not show the orig. consid. "doing" on foreign judgt. you may bring Indebt. Ass. is concurrent with debt. 2 Ha Bl. 1110. Doug. 45.

There are certain cases where a judgt. may be attacked without writ of error or new trial. It goes upon the ground of fraud for fraud blots out all contracts. So if one comes with a false token from your friend, you deliver money to him. It is as much theft as if he took it out of your drawer. notwithstanding the delivery in the case of the silk stockings. Jones bot. with the

* In the first case as to build a house or pay or forfeit a sum greater than the cost of the house covt. broken lies as well as debt. but in the other case where the penalty or damages agreed on is the price of reconciliation. covt. broken does not lie. but debt does. –

2 & 3 bills of exchange. Clear fraud. To prevent
such blot out time. Cases of escape from
jail or legal escape to prevent Bill from
having money with jailor for his support.

And
when proof is obtained by fraud it may be set
aside directly when debt is tried upon it. The proof
is now it is no proof. See 1 Str 514. 2 Wils 27.
3 Wils 341. Bl. Rep. 1211 Sta 592. 890

For money due
by bond or single bill debt is the only action
5 Rac. 13. Suppose the bond conditioned for
the performance of a collateral act. if you sue
on bond fact it is debt. But if you plead
you may treat it as an agt. to do the collateral act
& bring a bill in Eq. for specific performance
So if the bond was to convey land, maintain
wife, &c. &c. —

So when a sum is due on con.
ling a sum certain you may bring debt or con. Brok
7 V. Rep 124. If a penalty is annexed to the per
formance of con. you may sue in debt for the pen-
alty, or in con. broken for damages —

When an act may be
the forfeiture is to compel a future performance & altho
in which it is merely a forfeited damage between the
parties having it optional with obligor to perform
or forfeit — 2 Burr.

2 Bac..

Debt lies against officer for money collected in Sept.
Stat. Wisc. 2 Ch. 2 Geo 1842 553. this seems to be founded on
the implied contract to pay over the money

Action of Detinue.

Detinue has now gone out of use since trover lies where Det. would lie in many cases where it would not. It is the only action at law in which you get specific relief, thus having the effect of a bill in Eq. This is a case where one gets possn of something which money will not buy as family pictures. Trover would only give damages but the property in time. Damages are assessed by the market value of the article. 3 Bl. 152 & no 2 361. When judgt is rendered it is that the property be delivered up, or a certain sum be paid which is a penalty.

It lies for any personal thing that can be identified. It is no remedy where defts took the property tortiously the principle on which this was founded, & one answer it was and said that a tortious possn gives no title to the owner of the property it is not so now. 3 Reeve Hist. 67. 4 Bac. 11.

Action of Accounts

When the accounts of Ch. this action is out of use except Corp. in which this action is brot.

This action is always founded upon some contract express or implied. at C.L. it lay agst. none except Guard. in Soccage & Bailiff & Receiver. There used to be a diff. between Bailiff & Rec. but now treated as synonymous — This act. has been extended to tenants in common. Partners in trade by statute. So Ex. & Adm. are answerable in this act. 1 Bac. 16. 1 Inst. 172. 89. 1 Com Dig. 85 85. agst. not so for there was no privity with them

These extensions were in Eq. 1st & 3d except as to g. tenants & tenants in Com which were prefered in the time of a term.

Owners may sue upon engagements made for them on other. the Pltff declares that he delivered property to Deft. for which he has not accounted. (when requisite) & for hence to render his reasonable acct. & to recover damages better. If Deft. in Decl. alleges the acct. & pledges goes by default damages are not awarded but judgt. is quod computet.

The auditors examine every thing even the Lawtis themselves.

If Defdt. plads never B & R. is a. the qu. issue. the jury finds that he was bailiff to R. the judgt. is good computat. auditors are authorized who report it this report operates like a verdict. & judgt. is rendred on it.

After judgt. for good computat. Defdt. cannot plead that he was never B & R. before the audrs. but he may show that there is nothing in arrear. the true fully accounted is technical — All evidence that he has fully accounted. or never B & R. must be rec'd. even in the first instance as a release &c. And every thing that goes to show that he is able to acct. goes to the auditors. —

Before court & jury Defdt. may plead anything that goes to show that he is not bound to acct. as release. an award of arbts. never Bailiff or Recr. that the business has been settled. i.e. that he has fully accounted. but it is not a good plea to a court & jury that there is nothing in arrear. a plea of fully accounted is diffnt. from nothing in arrear. and to make a good plea in bar it must appear that there is no room for settlement. every thing else is to be pleaded before the auditors. whatever can be pleaded in bar must be pleaded that go before the auditors. 1 Roll. 128. Cro Car. 82. 1 Com. Dig. 91. 94. Cro Eliz. 830 3 Will. 115. 1 Bac. 20. 6 Co. 7.

Before the auditors anything that shews that Defdt. ought not to be liable is good accounting

But in Ch.: it is all settled in one action.

1 Com. 98
1 Roll 120

Trover or detinue lies aq.: the bailee. and trespass against the disseisor for in this case it is in the nature of an action of account for the mesne profits. 1 Com 8, 7, 8, 9

as that property was destroyed by inevitable accident as by fire shipwreck &c. 1 Rolle 1244. 1 Com Dig. 93. Co Lit. 89. Stra 680.

Any reasonable disposition of the property is good accounting, provided his commission did not forbid it. as if the goods were perishing. In accounting Deft is allowed all losses by inevitable accident or robbery. 2 Mod. 100

If Deft is found in arrear judgt goes for Pltff to the amount.

These rules apply to proceedings in Eqty. But in the case that follows the process is ancillary in law & Eqty. It is said. that if £100 is delivered to trade with you are not to bring actn for it but recover it by two actions in debt for some certain £100. & an acct for the profits (a) Suppose a lends money to B by b. the question was whether B could bring the action. strictly the contract was with A & B. But I think L. Holt can demonstrate that B could maintain the action for b makes an implied contract with him the he never saw him

If one receives goods as bailee merely he will not be liable because he does not receive them to improve. neither does it lie after tortious taking. nor for the mere act of gratuitous dispersion* except in cases of receivers who may treat as dispersers or as guardians & calls him to acct. the reason in these cases is that there is no contract which is the foundation of the action of account.

Of Injuries affecting the character.—

Torts may be to a man's person his character or reputation, or to his personal property.

1 As to injuries to reputation this is accomplished by 3 distinct injuries for which 3 distinct actions are given. 1st Slander, the act. defamation. 2 Libel only differs from being written. 3 Malicious prosecution intended to convict an innocent man.

Now on a contract you must recall on joint & sev. contracts you may sue all or one. In torts gen. you may sue all or one or any number at once another difference is that in torts if you sue & recover judg. agt. 2 of 3 wrong doers you cannot sue the third. the first judg. is a bar. now in contracts you may sue all till you get your money.

Slander is of two kinds. one is called actionable in itself i.e. you may recover if you prove the charge whether you prove damage or not. the other is known as the offensive tendency or rather words actionable by reason of special damages in which you must state actual damage & prove it.

All words that are true would reflect the man to punishment are actionable in themselves as charging one with stealing but not with charging one with lying.

I should think it good policy to make cunning with the lie actionable.

2 When a man is charged with that which goes directly to discharge a man of all his business, as a lawyer with being a knave, but to call a physician a knave will not be actionable for altho it goes fair enough to injure his reputation it does not go directly to destroy his means of living, the to charge him with being a quack would.

3 Another set of cases is charging an officer in official capacity with corruption or any thing that goes to injure him in the view of the public it is actionable in itself whether relating to his integrity or ability.

4th Last is charging a man with a disease which would banish him from society as leprosy.

As to words not actionable in themselves but become so by reason of special damage. they are all words which eventuate in damage to Pltff and this damage must be laid in the decl.n no matter how scandalous the charge is if not actionable in itself nor productive of special damage.

In Eng. a charge of prostitution is not actionable except in the city of London where prostitution is punishable

In some cases where the punishment is merely a fine the words are actionable & some not. in all cases of corporal punishment the words are actionable. –

The distinction appears to be this. If the charge is with an act that affects his reputation the it is punishable only with fine. is actionable. But to charge one in Boston. with stealing property of his value than $10 Board in Eng. charge of keeping a bawdy house is actionable the punishment only by fine. but to charge one with having been in or found in anything but woolen is not actionable.

The charge must be both False & Malicious. truth is complete justification. – But if not true circumstances may be such as to prevent the Plff from recovering. as to this we must explain the word malice. this is better expressed by the Latin term malitia according to the legal signification. – it means wicked motive that need not be express. want of benevolence is enough. If the charge is false. the malice is presumed and inquiry is considered as proved if the words are proved. the onus lies on Deft. to prove the truth of the charge, or that he spoke them without malice. Speaking the words is prima facie evidence of malice. –

As Pltff's character is in issue it has been questioned whether he could prove his character perfectly fair, & decided that he could & it goes to enhance damages

Words actionable in themselves may be so coupled with other words as not to amount to an actionable charge. as that A is a thief for he entered upon my land & cut down my trees. this is a mere trespass. – A Gaby said of a lawyer with chffl. for she had stolen his heart.

It is said often that certain words spoken in heat of passion are not actionable, passion is no justification; tho that great provocation may mitigate damages. but never justifies the offence. the law regards the feelings of men, but not their vices. anger without cause should enhance damages. the maxim then is without foundation. –

In every action of slander the Plffs character is put in issue. the Plff puts it in issue & opens it to examination, if one charges a & with being a thief for he has stolen his horse. if he proves the theft of the horse the charge is justified & Deft has judgt. if he proves Pl's gent character to be that of a thief. Plff has verdict but mere nominal damages.

Altho the words are false if Deft. honestly if malice the Plff cannot recover, as that the words were spoken in such a manner & under such circumstances as to preclude all suspicion of malice. As where one came to a person merely to know the character of a discharged servt. Buck. ch. Pl. 8.

So where one sees his neighbour about to trust a servant

he knew to be in failing circumstances, or supposed to be so, tells his neighbors what he thot to be correct to prevent his loss. Agst. where a charge is made in a course of legal proceedings & it turns out to be false, may malicious, no actn. of slander will lie. policy prevents. the remedy is an actn. for malicious prosecution. where probability will accuse

Agst. witnesses are not to be subjected in this action even tho' the instigator was prejudiced. he may be subjected for perjury & here if they spoke what they supposed to be true they can be subjected in no action. otherwise no evidence could be had. perhaps the charge could be proved by wooden witness

It has been questioned whether the reporter of a story which he rec'd. from another & believed to be true, could be subjected in this action. the decision are that he can, but suppose he would come forward & give his author & the author is a man of property so that Pltff could have his remedy agst. him. said once a formerly decided that he should be excused. but it is not so now.

Counsel in his argument may attempt to support his client & charge the Pltff. with the offence which he is to justify. the law allows him to do it. But the Atty. must not take this opportunity to maltreat the party & charge with other crimes.

Pltff mentioned the great expense of his family. Deft said he could not afford such expense for he did not know how to counterfeit. Held to be actionable.—

(Salk 694)

"Have you had S.S stole F.N. horse? observe I do not say "he did" the last said is correct enough."

2 Lev. 150

1 Mod. 276

Whatever language is used if it conveys the idea it is actionable. Palm. 68. "as you deserve to be hanged" "for what" "anyman deserves to be hanged that steals Jones horse" "you may run for changing with theft." Cro. Car. 247. 2 Wils. 300.

The charge may be made by way of question. 12 Co. 134. So by way of conjecture. as "am I to guess. I should guess it takes stole this horse". 1 Vent. 159. So by way of report. as that "he heard a bird sing that one stole the money". 1 Roll. 64. 1 Lev. 27.

So by way of an illusion as "I know what I am & I know what Knotes is, and" "I know stole sheep."—

Charges of scandal of general as that Pl. is a thievish fellow not actionable Hardy 87 not at being charged. But a charge of a "thieving rogue" is action able. 1 Sid. 37. Palmer. 64 1 Roll. 47. 51.

The charge may appear vague as that one of your brothers "stole" if from circumstances it could be shown which is meant you make out your charge.—

Character is not brot. into the question where the charge is of a punishable crime. Cro. Eliz. 638. as treason...

The word murder is used in a diffnt. sense often, from its legal signification. as when one charged a man with having murdered his wife when she was by alive.

1 Rolle. 65

Sho. 122
Cro. Jac 114

There is a decision that if one charges another with murder and it proves that no one was killed, the words are not actionable. because it is said the Plff could not be subjected to the punishment. I believe the decision to be incorrect. For persons are sometimes punished who are not guilty.

Upon forgery. to be guilty of that one must have taken a false oath in a court of justice. & it must be proved to support the charge. it is not supported by proving neglect of duty in an officer who has taken an oath of office. swearing false before Arb.rs has lately been determined forgery. the oath must have been taken by a person proper to take it. not by Arb.rs as such namely. formerly tho.t not. because it was supposed & that the false swearing must have been in a court of record. but forgery might always be committed before Ch.r of Eq.y & the late decisions are doubtless correct. 4 Co. 15. 3 Lev. 166. 1 Roll Ab. 69. 70. Bro. Bar. 268. Bro. Sac. 158.

As to forgery there is nothing particular to be said. it must appear from the whole said that it was intended to charge with the crim. forgery is in legal signification to do a thing for prevention of justice. Obligee attend the bond from A to B. it was not forgery (but from a maxim of policy no recovery could be had upon the bond.) so that the charge of having done this when he did it for the furtherance of justice & Eq.y. — If there is no qualification after the charge of forgery the party is supposed to use it the kind

Cro Js 39. 674
Dob. 331. 2 Lev. 51

1 Vent. 213
Ld Ray. 959

so one was charged with being a pick pocket by one to whom he often came for money. —

4 Co. 17.
1 Roll 39. 51. 65. 71
1 Lev. 156.
Cro Car. 622.
Stra 14 2.
Cro Eliz. 268.

(d) Now I confess I do not see the reason of this distinction words which are not actionable for the purpose of showing the quo animo with which the other were spoken. It is said that judgt. is to be arrested in the first case because the Ct. cannot discover upon which charge the damages were assessed or whether upon both. — How can it be discovered in one case better than in the other?

There can be no theft of that which cannot be stolen, as to steal treasure. — If charge of theft is qualified & connected as it comes out in evidence, with such acts as were not criminal, & shew it not to have been the party's intention to charge with a crime the words are not actionable.

Formerly it was actionable to charge an with witchcraft & suits have many actions founded on such charges. but as the law is repealed which made witchcraft penal. such a charge is now not actionable.

To charge a man with a crime after he had been pardoned for it was formerly actionable. the ground being that he was now a homo. But now it is understood that the person is not pardoned for not being guilty. & it is not actionable (semb) thus to charge one. Hob. 81. Stra. 304 & the charge may be justified by the incorr.

Suppose the Deft. includes words actionable & those which are not. as "liar & thief" & verdict is found for Pltff in $100. the Dft. having plead the qualified plea. he should have demurred to 1pt. & qualified plea as to the other, on this verdict of $100 it is sd. judgt. cannot be rendered. & this even if no evidence were adduced as to the charge of lying. for the courts are not to know upon what the verdict was found. here the words are in two counts. i.e the words actionable & not actionable. But if one count contains words that are not actionable as well as some that are. judgt. is not to be arrested when the verdict is qualified because it is said that the court will see that the jury know the law. — (d)

Words actionable in themselves may be proved on the trial tho' not laid in Decl.: this seems to be a hard rule, but I do not know but it must remain a rule. the ground is to shew with what temper of mind the words laid in the Decl.: were spoken. no damages however are to be recovered for the words not laid. ib. ibid. I am afraid to it because it influences the minds of the jury & thus is the man punished twice for one act.

As to the slander of an officer, it is to be remembered that the words must have been spoken of him in his official capacity. merely lessening the man in the eye of the world is not enough. but a charge upon his ability or integrity is actionable. 1 Rolle. 57. 1 Lev. 280. Cro. Car. 243. Cro. Jac. 240. 8 Mod. 270. Ld Ray. 1369. 1 Salk. 695.

To charge a man with principles inconsistent with his office or inability to perform it in a colloquium concerning his office is actionable & it is not material whether it be an office of honour trust or profit. this is the language of Ld Mansfield. You observe it must be spoken of the officer in his official capacity. & must be so laid in the Decl.:

A charge of corruption or want of integrity are not actionable unless spoken & applied to one in his official capacity. It has been said that to say of a man in an office of profit that he wanted ability is actionable tho' of the office

were of honour merely such a charge would not be actionable - but I see no room for the distinction & it is contrary to Ld Hardr's opinion. - the only true distinction is as to the relation the words have to the character whether individual or official

Words spoken of one in his profession which tend to destroy his means of living are actionable. as if a lawyer that he will over throw his clients cause. cont. and a declaration of a physician that he is a quack. Cro. Eliz 589 Cro. J^s 222. 1 Lev. 115. Cro. Eliz 585. 1 Roll. 54. 62. Ld Ray^d 1417

So to charge a clergyman with "being a liar." preaching heresy. is actionable. 3 Lev. 17. So of breaking some sal alay regulations of society of which the punishment was by fine. As to the question whether the clergyman preached orthodoxy. (or are to find out whether he preached what that denomination considered as orthodox. -

Charging one with an infectious disease is actionable. the charge must be in the present tense. as the ground of recovery is that it causes persons to avoid Plff. perhaps indeed the intention was to give the idea that the party is still affected with it.

There can be but one Dft. in this action. the words of one person are not the words of another.

a man is presumed to have fair character until contrary appears, and that this allegation may not be unlawful except from long usage. — Yelv. 159

4 Bac 51n

When the words are actionable only because of special damage. the damage must be laid in the declaration or you cannot prove it.

Words actionable in themselves may be proved tho not laid in the decl.n & they go to show the quo animo. but no damages can be recovered for them. and it is said they may be proved true. but I doubt it as it would not remove the presumption of malice.

Declaration. It is usual to state that Plff is a man of fair character especially in that respect in which he has been slandered & this may be necessary from long usage. If words were spoken of me in his office the statement must contain his office & not kind: & that they were spoken in a colloquium concerning his office. Cro. Ch. 282.

It is usual to state that the words were false & maliciously spoken. it has been determined that if the word malicious. is left out, the decl.n is good after verdict. & the ground of the judgt. goes to show that the decl.n would be good on Dem.r it being that falsity implied malice.— Malice is the gist of the action. and if that is implied it is suffit. 1 Com Dig. 195. & it can be implied no more after verdict than before. A Judge in N York said this adjudication was questionable. 1 Keb. 273. Bull N.P. 8. Days Ed. 516 & says further that if an Aff.n implied by law. after stating the facts on which the promise arises it is indispensable to raise the promise in the Dec.n the words then used are technical.— Now I think this is quo-

Ro Car 499
2 Johns 118

Ch Ca 166
2 Vern. 114
Bro. Ban. 443
Bro Eq 416
1 Roll 84

tionable. in Lex Mer. you are not obliged to raise it & there are three decided cases of it. the statement does not mean that he promised but that he is liable as the promissor stated in Dec.ⁿ L.ᵃ Ray.

The words are usually stated to have been spoken in the presence or hearing of some particular person or several persons. & there may be some danger in not inserting both. for all the cases sustaining a decⁿ in which case only was inserted were after verdict.

Must be averred to have been spoken about the Pltff by way of inuendo unless the conversation were directly with Pltf.

Where the ... are not actionable in themselves. the special damage must be stated & so particularly that Dfⁿ can meet the proof. so that "whereby Pltff lost her marriage" is not suffⁿ; it should have been stated with whom. decided by Judge Nottⁿ

The inuendo does not enlarge the decⁿ it merely ascertains the charge — If the words spoken apply to person by way of description you must aver your relation as landlord. brother &c if merely addⁿ as Capⁿ it need not be averred that Pltff was capⁿ unless it were indeed in a colloquium concerning his office. If the charge were "Every sheep stolen in Litchfield for a week. Pltff stole" here you must aver that there were sheep stolen. this is correct but if the charge were the greatest thief in Ct it would be hard to require one's aver. the the rule does require it.

(2) The truth of words must always be pleaded. if true it is damnum absque injuria. under the gen. issue the truth will not by b.l. be received in evidence: — 2 Stra 1200. Esp. Dig. 518.
But if Pltff after proving the words laid goes into evidence of other words to show the quo animo. Defd is allowed to show the truth of those words. Bull. N.P.

you may defend yourself by proving the charge true. Defendant must by C.L. plead this specially & depend upon the record. & the truth cannot be given in evidence under the gen. issue (w)
It is allowed in some states by stat. to plead justification in evidence under the gen. issue. but there is no inconvenience in this practice. & our court has made a rule that the Def.t to do this shall give some days notice & after that you cannot deny the words.

Def.t plead,

justification, then admitting the words. shall these words before to have been spoken. it is admitted. Pl.iff wants to desist to show malice. & again Def.t wants to show the palliating circumstances. this is a great question. In Eng. the prevailing opinion is that there is no occasion at all to prove them. in some states the division is otherwise Dayo & Sp. 518 4 Co. 16. 5 Co 125. Stra. 1200. Doug. 323 In N York Foote & Tracy. 1 John 46. the court were divided. 2 My own opinion is that it ought to be proved. not to show that the words were spoken. but to show the circumstances of the case. B. & N.P.G. Yelv. 159. 1 Lev. 250. 280. 6 Co Eliz. 486. 6 Co Lac. 39. Co Car. 190.

It is laid down in the books that if the charge were of having murdered. the person should be accused to be dead on the ground of the principle that slander will not lie unless the person is dead. yet it might be otherwise if it were so.

Slander is no offence at

C.L. tho it is by stat. in E.g. & this is argued of giving vindictive damages. that argument as used in other cases is a fallacious

Cro Eliz. 239

[illegible]

2 Mod 302.
5 Mod. 168
Cla Ray. 418
5 Co 125

In ass.t. Bat. it is said you must give great vindication damages to prevent repitition. true great damages might be given but no more than is suff.t to pay the damages done to Pff. for the public has taken care itself in punishment. by fine &c. the public prosecutor is bound to bring his action ag.st the Def.t for breach of peace. & the fine should not be thrown into the pocket of the Pff. W.t is you observe is not the case with the slanderer. 1 Roll. 82. Wils Stra. 666.

The gen.l allegation that by that Pff has lost his friend is immaterial & amounts to nothing but if he has lost anything by loss of particular friend it doubtless may do good. — to be proved.

Justification admits the malice. but it may be proved that the words were true to mitigate damages. as Pff may offer his char. If the charge is a theft you may prove any theft. but if it were of a particular theft you can prove no other than the one spoken & charged.

Libel

Libel is a civil offence & public wrong. anything which tends to blacken a character or affect a man's reputation if reduced to writing would be libellous. as a liar or scoundrel &c. So that a libel includes all slander which is reduced to writing and besides that all other words that tend to make a man ridiculous in the eyes of the world. So that the

N. Sta. 895
1. Hank. 194

Sta. 478

is no inquiry as to whether the words were actionable in themselves. — Another difference is that but one can be sued at once for slander the many suits may be had yet in libel many may be joined all that can be proved to have had a hand in printing or publishing the libel. —

"The principle of not allowing proof of the charge in case of a libel does not apply to prosecution for the civil injury & damage to the individual only. i.e. Defendant in this case prove the truth". "But when the public prosecute for the crime of publishing the libel, the truth cannot be proved because the whole ground of public prosecution is entirely distinct from that upon which an individual prosecutes. the individual prosecutes for damages for the injury; the public for disturbance of public peace. & the public is as much & most commonly more, endangered by truth than falsehood so that the principle is perfectly correct according to my opinion. —

As to libels upon the government. I can conceive that the measures of government may be discussed & the discussion may be conducted in a libellous manner & then the truth could not be proved."

"For libel one action lies against two or more as against out. as for slander an action against two cannot. —
2 Johns. 74 Tillotson vs Cheetham.

A libel must be published. to write it for amusement & laid up is not a libel. what is a publishment?

1 Johns. 280

This is a question of some difficulty. by the books "giving currency" is publishing. if one reads a slander to any body he merely for the purpose of disseminating it is publishing. but merely reading it to one's family is not. there must be malevolence. A printer however is liable tho he knows nothing of its tendency.

Question of evidence. could a former libel by Plff be given in evidence to show provocation. the Ct admitted such evidence on the ground that one libell was an answer to the other. Now the principle is that immediate provocation may be given in evidence in some cases of torts or of a mitt pb altry. but not a provocation that took place long before the act sued for. for the law is tender of the frailties but not of the evil passions of men.—

Lunding a

letter is clearly indictable. if it contains personal abuse to one or his family. but could one sue for damages? if it published? 1 Cairns. 583. Decided the fine case. that an action for damages would would not lie. for want of proof.

B. & N. Y. mal. pros.

Hob. 206
Cro. Eli. 132
1 Lev. 225
1 Vent. 12
21 Car. 14

Malicious prosecution & Vexatious lawsuits –
In libel reputation is damaged. in malicious prosecution affects also his property altho' here also reputation is the great thing. in Vexatious lawsuits expense alone is complained of – not trouble not reputation.

In vexatious lawsuits. the suit must have been brought sans. there was no right of recovery. the suit must have been brought to vex. or for revenge. when this disposition is discovered in the proceedings an action lies. It does not follow that all Pltffs that fail are liable. It is enough (as decided) that Pltff knew he had no right to recover without the design to vex.

There are three classes of cases of vexatious suits. 1st If Pltff was sued before a court without jurisdiction he can recover all expense & damages for trouble. In all cases there must have been an end to the vexatious suit. It was formerly that that no suit could be brought after retraxit or judgment on demurrer to bad dec. because the court knew it but the man was liable. the rule now is that the suit must be at an end. no need of acquittal

2 When an action is brought to recover a money & valuable part, [illegible] is clearly actionable. I think that if the suit were to establish reputation the Pltff is not liable. But decided in Ken. that a girl who brought an action of defamation of her chastity twitted about it when she saw proof coming to justify what had been said. was liable to an action for malicious. Dwd. ag. Ct. decided 3 to 2.

Not. 266
1 Stat. 114

3 Class of cases is where one has a right of recovery but conducts it in a vexatious manner, as seeking for a great sum when but a small one is due, which harrasses Deft. in the suit from getting bail or in getting a writ is bond after attachment in Essex. So the conducting a suit in any way that shows malice & determination to wrong. as where a man arrested a wealthy man in the streets of New York which made him trouble by alarming his creditors altho arrested for no more than the sum due. the money could have been obtained at any time. he had in. Court heavy damages should have been given.
It matter now whether the suit made in abat. or non suit or retraxit or any way. And the damages are to be amount of costs & damages as all pers be. the court will not be particular as to the amount. In Connecticut we give treble damages & fine the rascal besides —

In actn for Malicious prosecution the jury give much liberal damages than in any other for it includes a means drawn intent. — Any one who promotes the prosecution by relating stories such as to induce the public prosecutor to take it. p. or any one who maliciously puts in spiritous action. — The expense of defence is calculated in the damages but the chief thing is reputation. no action of slander lies for proceeding was at law. — It must have been both without probable cause of prosecution. & this probability covers the malice. So there must be probable cause & malice

1 Selk. 58

2 Bul. N.P. 16.

x) Of its regards a felony. & there could be no probable cause without mere malicious prosecution with. but neither of these positions are in fact true. Case of a horse lost. & a man found riding him who flied immediately to the woods. &c. Both cases of the lawyer & sea Captn who paid him in counterfeit kind of coin. & charge of theft upon a servt for stealing it &c. –

Probable cause is a concurrence of circumstances such as would induce a candid man uninfluenced by passion & interest on public grounds, to believe that conviction was probable.

It is laid down in the books that there must have been a felony committed. the reason of the rule is not apparent. and I do not consider it as well settled and I do not consider it a good one. Now if there was no felony committed would it not follow that there was no probable cause.

To be entitled to recovery for malicious prosn. malice must be proved i.e. a wicked motive. & want of proper cause. they are both indispensable. Acting unwarrantably is malice.

'Suppose a man bd. before grand jury & acquitted it appears that there was no probable cause the onus is on defn. to show want of malice. but if one is bound over by justice of peace or a bill by the grand jury it then devolves upon Pltff to show malice. that defn. acted improperly & without probable cause. Pl. binding over & finding the bill, prima facie rebuts the presumption of malice.'

The only ground that Pltff has for complaint, is malice in this case. — Pltff in this action must establish the malice & the want of probable cause. this is indispensable. Want of probable cause implies malice. tho this presumption may be rebutted.'

All these actions mentioned for slander. libel. malicious prosecution & vexatious lawsuits. are actions on the case

Trespass vi & armis

Assault & Battery

An assault is an attempt with force or violence to do a corporal hurt. it is an attempt to do a thing which when done was to be a battery.

The party is put in fear & his feelings are insulted & there are grounds of damages feelings are regarded. notice taken of the time & place.

I see no reason why a man should not have case for fear & anxiety by words. But an assault cannot be committed by mere words. The assault must be made within reach. shaking fist at one 40 rod off & bawling that you will knock his teeth down his throat is not an assault. a threatening posture he may not be assault in consequence of the words spoken. as drawing sword & saying were the court not in reprimand he. the act was not an assault.

I should differ from J. Blackstone so far as this as to call that an assault which actually frightens the Pltff. & that it depends upon the relation & situation of the parties & perhaps their peculiar situations.

In all these actions of ass & battery all abettors & encouragers are principals. there can be no accessory. no matter how little were done if any thing. any or all may be sued at once.

A battery is an actual exertion of violence upon the person of another. — corporal hurt is not indispensable for spitting upon one intentionally is a battery. pulling a chair away from under one is a battery. crowding one into the corner. —

A man is injured by another who is doing an unlawful act. he would not for the world have injured the P'ff still the action lies. because he is in pursuit of an unlawful act. — And if his in pursuit of lawful business with ordinary care or such as ordinary men use. no action lies. but if this care were not used. if he were careless. the action would lie. Thus a soldier had scoured & put up his gun soon after found it in the same place, & took it up to snap it. it had been loaded by some one else with small shot & went off & injured some one slightly. he was held not liable. —

If one is about unlawful business no matter how much care he takes: but in lawful business care may excuse

In trespass the injury must be immediate. in case the injury is consequential. See the sqrib case in B.C. Rep. When one struck B's horse & C was run over by it. it was held that the striker was liable in trespass & the injury immediate. apts or rather touches in fencing or sparring are not actionable unless there is foul play. because the recreation is lawful.

Intention of the actor is not regarded. the business about which one is engaged the manner of doing it determines whether one is liable. — Ball. N. P. 16.

Two persons go out with agreement to box. both are hurt. One brings the action. the court D. the agt. was void. of course the Deft. liable. Somebody this very reason ought to prevent a recovery. we do so in all contracts. If two or more are engaged in breaking the salutary regulations of society let them take the consequence of it. policy requires this rule. the rule as established in Eng. tends to encourage such combats. And of this opinion are many of the great lawyers in Eng. 2 Lev. 174. Bell. P. 16

As to justification for aft. & bat. see "False imprisonment"

False Imprisonment. —

Every Battery includes an assault & every false imprisonment includes both. This action is often brought. Restraining the power of locomotion is imprisonment. if done without authority it is false imprisonment. so it is, if done under authority, but unlawfully exercised. Any restraint is false imprisonment. —

This action lies agt. any person who understates to exercise unlawful authority. If common judges act erroneously they are not liable. Same not speaking of judges of genl. jurisdiction acting maliciously, acting judicially & having Equr. But if they act beyond their jurisdn. or committing to prison without authority or commit by fraud

But if the Ex.rs were ignorant ~~without~~ authority the justice & Diffance bot the liability

Cf Ray. 229

2 Str. 1134

where the state requires a written authority. This action is most usually brot agt Offrs. & Offr. & constables &c. for illegal arrests.

There are cases where the arrest is illegal & officer liable & others where the arrest is illegal & officer not liable. The Gnl rule is that where it appears upon the face of the warrant that the Offr. had no authority to execute or the court to issue it, the officer is liable. Now the Offr. is bound to know the law of the land. Suppose the Pt. of Com. Pl. issues a warrant to commit a man to St. Gate for burglary. now this court has not cognizance of this crime. if the Sheriff executes the warrant to prison i.e. St Gate. he is guilty of false imprisonment. — Suppose it does not appear upon the face of the process as one exists for $30. it would be that the justice who issued the Exn had not authority of the subject matter, but this the Sheriff is not to question & he is not liable for executing it. 10 Co. 76. is a wrong decision. it was an arrest without the 1st rule of jurisdiction of the marshalsea court. & decided to be illegal. the want of authority did not appear upon the face of the warrant. & the case in 4 Ray. decides directly agt it. besides the cases cited to support the case in Cowper did not support it. If the Offr. cannot see anything illegal on the face of the process he is bound to execute it.

A bill of attainder agt B before the mat. to A was exd upon it. B had obtained a protection to come before the legislature to attend upon his petition. before the gnl Ap. rely. Parliament

1 Mod. 95
1 Salk. 85
Stra. 702
9 Co. 56
Lev. 5 Ej. 227
Bac. Abr. 280

he was going up under the protection of a writ of habeas corpus & then relinquished his action agt the Sheriff for releasing him. — It was said that the Sheriff had no power to grant an insolvent writ & determined that they were under the circumstances ~~had~~ & were acknowledging ~~that they had not the Sheriff was not liable.~~

~~It was decided in the county that a Sheriff has a right to execute all process that appears legal on the face of it.~~ 2 Mad. 195. In this case the protection merely stated that B had a case before the legislature. now if the Assembly had authority as a court in any case the Sheriff was not liable. ~~but that authority~~ as an inferior court they have such authority. so that ~~if~~ the Sheriff was held not liable as he could not, receive from the form of the warrant ~~that it~~ was illegal. — & further if the Sheriff knew that the warrant was illegal yet if it did not appear upon the face of the process the Sheriff is not liable. — 2 Bl. Rep. 1057.

Rule 2. all judicial acts on sunday are void & but this rule does not extend to ministerial acts. they were made void by statute. it first extended ~~to~~ arrests of persons going to public worship. but the stat afterwards extended it to all arrests on the sabbath. & this is considered as b. L in N.S. & such arrest is false imprisonment. except in case of escapes. & criminal cases of felony. or a person under bail running away the bail takes

* Letting is the ground on which a bail is allowed to arrest his principal in another state with his bail piece if it were a warrant the authority of it would extend no further than the jurisdiction of the court.

without warrant. His bail bond is only evidence that he was bondsman. Where one gives bail for another that other is his prisoner. He may commit him to jail at any time.

An arrest on sunday is void. but the man refusing until monday & then bows his execution. 5 Co. 92 Sarains case. from that case it appears that this arrest is good. but 1st case in Comp is directly agst it. These cases are analogous. only the law is that the outer door of a dwellingh shall not be broken for civil process. & it is trespass to do it. A house was broken & a levy made. in Sarains case it was held the sheriff ought to be liable for the trespass but the levy good. The whole question in Cooper vs Parl. Gansell & Lee was whether the door was an outer or inner door. & if the court that the case in Comp good authority. that question would have been immaterial

I believe it correct to say that no man shall ever derive any the least benefit from the breach of the regulations of society. On this ground I think the arrest on monday would be ill. 5 Mod. 95. Comp. 200. 1. Salk. 153. 2 Bl. Rep. 823. 2 Burr. 1048. 6 Mod. 95. 154. 4 Bac. Abr. 5 Bac. 170

There are cases in which a man is allowed to take advantage of a wrong act as if A took B's horse without liberty. B demanded his refusal. Knocked off & took the horse. at the Bright

might be liable in aft. & B. battery still a court could not order a restitution of the horse

Of Justification for battery & false imprison.

A battery or false imprisonment is in legal language be justified i.e. the act is not considered as batty. or false imprisonment. Thus if one is about to break the peace or commit a crime another may restrain him without warrant. Even when the man was not actually about to break the peace yet if it appear to the triers that Deft. had good reason to suspect the commission of it he may restrain with force. It will not justify fighting in behalf of a weak man who is attacked but all fair necessary to restrain from breach of peace.

An offr. is justified in arresting if his warrant is not defective on the face of it. Sometimes even beating violently & imprisoning. If Plff complains of batty & imprisonment. Offr. need only to plead his warrant setting it forth that its legality may appear to the court. If however the Plff goes further & says that the offr. beat & wounded him. the Offr. is then not only to plead that he had such warrant but also the resistance made by the party. for the Plff is bound to take it easy at all events but with as little wounding as possible. –

An other defence is son assault demesne. & for this it is not necessary that Pltff first struck. if he held a stick over your head you need not wait for him to strike. the justification is good. The plea is that Pltff first assaulted him

The ground is that a man may defend himself & his fam but as to prevent another immediate attack. but the party can never justify in this way the effects of a malicious revenge this line is extremely difficult to be drawn. the man ought not to be compelled to let the attacker go the moment he gets him down, nor indeed to give him one revengeful blow. — If the, second man come up & beating would be necessary to incapacitate the attacker. —

Words will not justify any thing tho they will mitigate damages. but will never diminish down to nothing. words spoken at one time & place may go much further in mitigation that if spoken upon other circumstances.

Another defence is relationship of parent & child. husband & wife. &c by which one may justify an attack in defence of the other. one would not be justified in entering into the quarrel. but the result of the ruling this that the parent may do precisely what the child would be justified in doing. —

another defence is mollitur manus imposuit. one may knock down one who attempts to get away his property & his defence must be "mollitur se" & may not may break the peace to protect & preserve his property. but after a wrong does has passed himself of another property. the owner may retake if he can without breach of peace. but not with breach of peace. this plea is used when the property is attempted to be taken without any apparent injury the person. if there is such a apparent the plea son ass' is the proper one.

When the words circumstances are very provoking the jury always give very small damages. Passion is no justification but the provocation which excites it may diminish the damages to almost nothing.

It is often a justification that the person is a father or master or schoolmaster. the rule is as laid down. that he might moderately chastise what is moderate chastisement is very difficult to explain. A German would be shocked at a Scotch licking. On this subject I consider that the party acts in a judicial capacity. that a master or a parent or schoolmaster is not to be subjected for an error in judg.t but if he corrects malo animo. from a spirit of revenge he ought to be subjected. the animus is collectable from the manner in which it was done. the temper shown at the time and the instrument made use of.

A suit was brt. in N. York by a child by his prochine ami
agt. his father who threw him down stairs & stamped
on him. the parent was affluent. & as it was ap-
prehended that the child would be a cripple the
jury gave a handsome verdict intending to take
enough of his fathers estate to support him through
life. But when the party beats as much as
much as he in conscience believes his duty to do. he ought not
to be liable.

A species of aggravated battery is mayhem. which
is depriving one of a member useful in defence.

Now there is a rule of law in Eng which may be
in force in some states. of which I never could dis-
cover the history. it is this that after the jury
have given damages. the court may supervise
exercise enhance the damages. & this is the only case of the
kind in the law: tho the court in cases are allowed to table the damages.
If a recovery has been once had for a battery you can
never recover again for the same injury. & whatever
other damage may afterwards accrue in consequence
of this battery at the time of the recovery no
such future damage was anticipated. And this is
the rule in slander. but it does not apply to actions
on the case as for a nuisance. in that you recover
for the injury you received up to the time of bring-
ing the suit.

In this action Deft. must plead separately tho they plead the same plea.—

The first verdict ascertains the amount of damage Pltff suffered and Ex. for that same goes agt. as many as are found to have been engaged in the trespass. 6 co. Jac. 350. 1 Co. 6. 7 Bull. ni. P. 20. Otes. 1222. The jury can never sever the damages.

(d) Viz when Deft. all plead gent. issue or one pleads gent. issue & another demurs.

If several are sued. the jury has no right to sever the damages as for A to pay $100. B, $200. C. $300 because the Pltff is entitled to the whole amount of damages from each & every of the Defts. they must all be found guilty jointly that are found guilty unless one might be a bankrupt. & if only B were sued & recovery had agt. him. C may plead this judgt. in bar of a subsequent suit against himself but he could not if B had been acquitted.

But these three may plead diffnt. pleas. thus A. son assault demesne. B a warrant. C. gent. ipse. Here there must be three separate trials these being three distinct answers. Suppose the jury that tried one gives Pltff one score as $100 the jury that tried the two others gives $200 agt. one & $300 agt. the other.

Suppose agt. B & C. sued. B pleads gent. ipse & C demurrs. the jury finds $2000 agt. B. & the court give judgt. agt. C. for $2000. that being ascertained by the verdict agt. B. thus C is jointly agt. B & C jointly for 2000. Now in all such cases viz. (d) each is bound to pay all A's damage & he ought to be able to collect it all of one tho he may have separate suits agt. each if he so chooses to conduct it. In the above case the jury supposed Pltff ought to recover $600. but they have no right to do. the laws does not apportion it. Now Pltff is injured if he cannot have it agt. all for $600 but they he cannot have. he can take out E & agt. all these for the highest sum as $300

if he pleases. but this he need not do unless he chooses but may object to the verdict & have a new one. The law will not allow him but an execution for satisfaction

According to old law. diff.t battery might be joined in one act.n in such case jury must apportion the damages. but this practice has gone out of force. as by Bar monday to on tuesday Le.

Many attempts were made to introduce the verdict found in a former criminal case. as evidence for the civil injury. but it is now settled that it cannot be given in evidence. because Pltff is not the same person whom testimony convicted the Deft. and the verdict is ~~after~~ into alios.

But shall a verdict in favour of Pltff be given in evidence to convict Deft. in public prosecution. it cannot be so given being between different parties.

Injuries to Personal Property.

The three remedies for injuries done by force to personal prop^ty are Trespass vi et armis properly so called, Trover & Replevin.

Trespass is an injury done by one to another prop^ty by direct act. & it must be by a misfeasance not by non feasance or negligence. This is not the only action for direct injuries. trover also lies. If one takes the property of another & carries it off trespass or trover lies. But if there is no asportation no carrying off as when property is destroyed trespass is the only action. the line is nice but any asportation gives you a right to sue in either. But when the taking is lawful & you know of conversion trover lies without demand. but if you know not of the conversion you must make demand. In this case trespass also lies.

Pltff must have prop^ty to be entitled to this action. If the party had such prop^ty as not to be accountable to the owner, he cannot have this action. A bailee some one who holds by a rightful or lawful act or policy as in case of stealing. — But any rightful prop^ty will support the action when the party holds claiming title.

When a license is given by law if it is abused, the original license will not shelter the trespass. but if the license was a private one, it will. Thus every man is licensed

2 Roll. 561

to go into a house. if he breaks thing he is liable in trespass as if he broke glasses the act must be a misfeasance & the party is a trespasser ab initio.

This is said to be an case & Ct. A the Sheriff arrests B. the Pltff in the action tells A not to return the writ. B sues A in trespass it is said that the act was only misfeasance because he did not return the writ & A must be subjected in trespass for mere misfeasance. But the truth is A cannot produce the warrant in evidence for no warrant is evidence until returned. A the Sheriff stands in the same plight as if he really had no warrant. altho 20 persons saw the warrant no other proof but the warrant itself can be evidence. If the issue could have been proved otherwise than by the writ itself Pltff would have been acquitted.

If a license is given by an individual trespass does not lie, for a subsqt. abuse of the license, except indeed in the case of fraud. Thus one brot. forged letters of recommendation & procured credit for a large quantity of hats. it was determined that this delivery was not a contract. & trespass would lie. Other cases in Leach b. L. that go to prove such acts felony prove it a trespass. As where two sharpers in company with an innocent whom they intended to defraud, pretended to have found a jewel as all were in company they went to divide. they went to a jeweller who let into the plan. pronounced it a diamond of the first water. the sharpers sold out to the innocent man made off with the money. they were arrested & executed for the theft.

4 Mod 391
2 Roll 555

A Judgt. obtained fraudulently is void. but as it is not apparently void the offr. is not liable. but as the Pltff knows the judgt. to be void from fraud he is liable in trespass viz at common. such a judgt. is as if it were not. Suppose a judgt. erroneous, no one is liable for the levy for this judgt. was good as any other judgt. until reversed. 1 Lev. 90. but afraud [illegible] is a more nullity. the law however protects the offr. in obeying an order apparently legal.

If an authority is given by some statute. that authority must be strictly pursued. Thus St. gives licence to impound cattle damage pasant. & prescribes provides that the party give notice to the owner & if he does not he is trespasser ab initio & this altho the owner knew of the taking & the party proved he knew.

I am inclined to think that notwithstanding the cases in Bac. are not law i.e. those which go to subject a person for chargeable intermeddling with another's property as to get one's neighbour's cow out of the mire to prevent her drowning. there no cases to support me.

Here is a case where trover lies & trespass does not altho the taking was tortious. A stole B's horse & sold it to C. C honestly came in possn. was assured no title & trover lies. each possr. is liable to an action at the suit of B.

Oct 6th 1796

for Pltffs right to commit crimes at once on the approach bail.

(d)

In the water spout case the Defdt had a right to notify the Pltff's hand to cease. of the spout ~~for grounds~~ was held a consequential injury & not an immediate one in itself which case not impute was the proper action. 2 Cl & Fin. 488 2. Stra. 634.

B takes from A his pers.l property trespass or trover is the proper action suppose B sells it to C. who is not privy to the tortious taking. trespass would not lie agst C for his posn was lawful. but as he had no title. B not having any title could not convey so that trover lies agst him.

It has been much questioned whether Trsp. or case is the proper remedy in certain cases. A Sheff is bound to let to bail. responsible bail is offered but Sheff will not receive it. but commits the prisoner now is he liable in trespass or case? it is said that the committing is forcible & a positive injury (c) & agst it is said there refusing to take bail is a mere non feasance. & in Eng the rule is that case is the remedy. in Ken. trespass is decided to be the remedy.

Agst. one who erects a water spout that throws water onto his neighbours house. if the act was lawful trespass would not lie: but it might have been argued, the act was not lawful as land stands infinis ad coelum. So a mill dam may be raised so as to overflow a neighbours land. the building the dam is a lawful act. & the remedy is case Stra. 604. Ld. Ray. 1399.

It is laid down in all the books that if the act amounts to theft the party cannot be sued in trespass because it is D. the injury is merged in the felony. As the law once was. an action of trespass would be nugatory for all the goods & chattels of Deft. would be immediately forfeited on the conviction. written could you take the body for that must be punished. But in this country there are

2 Roll. 557
2 ib. 556
4 Co. 38.
Dyer. 5
Dyer. 181
Cro Eliz. 254
1 Dy. 25. Dyer. 608

A tenant at will may carry away emblements but if he should abuse this licence he would be liable in trespass. Cro Eliz 147. the licence is given by law.

Latch 214
Dyer. 5
1 Lid. 38
2 Roll. 569

no such laws. no forfeiture of goods & chattels or punishing with death for stealing. therefore the trespass is not more pen.

If cattle do damage by breaking in. they may be impounded. or they may be driven out & chased with a dog that will not damage them by tearing them. trespass vi et armis lies trawing cattle with a big dog. But a man must not let them out into the road unless he knew they came from that way. for if they were lost he would be liable. unless they found their way out without his letting down fence.—

Possn. is the foundation of this action. in contemplation of law ownership draws the possn. if anyone else was in possn. claiming title it is a diffl. thing. Wh. rule is diffl. as to real propty in Eng. where title must be rcd. or actual possn. taken. But in Con. the rule is the same as to real & personal propty.

Suppose B hires A oxen. & while in B's possn. C commits trespass upon them. there is no question but B the special propty. man can recover the whole damage that A could rcy. the whole value of the oxen & besides that his special damage. & after that A can bring no actn. agst. C. B can recover because there are cases in which B is liable in such cases. But if A sues C first he can recover of him the value of the oxen & then B may sue C & recover his special damage. If it could be ascertained absolutely that bailee would not be liable there would be no room for his action agst. the

1 Will. 55

Thos entring upon the land to his own use in trespass. 2 Roll. 560

trespasser. — If A brings his action agt. B. he waives his action agt. the bailee.

A man intending posn. without claim of title of any kind, when land, will not support trespass. If owner has had posn. so long as to furnish [illegible] as that the owner had licensed him to keep posn. he can maintain trespass.

An offr. is liable for taking property by mistake as much as if he did it knowingly. Now the Shff is not obliged to be certain he is in doubt as to the ownership of the property until the Pltff directs him to. if then the Pltff directs a stranger goods to be taken he is liable even to the Shff. this liability is not founded on a criminal act. there was no criminal intent.

Suppose one should forge a warrant, arrest a man, & under a tavern keeper to imprison the man, he did so, he was sued in trespass. I subjoin a promise of indemnity was implied in the request to imprison & the offr. or forger is liable even to the tavernkeeper who had no criminal intention.

Killing beasts from nature is not trespass unless they have the animum revertendi. Yet so nice are our ancestors that it would be trespass to kill them before they were able to get away.

Suppose goods delivered to one to be delivered back. then a Shff delivers goods to B. after he

* i.e when Pff cannot prove it.

had attached them as A's at the rent of B. they fast as the goods belonged to D. & he came & claimed them of C. he is bound to keep them & notwithstanding to shew he if proft. is delivered which one goes a journey. or a horse to a tavern thus. thus if the bailee chooses to run the risk being satisfied that the person claiming is the owner he may if he chooses deliver them over to him.

Trover.—

Trover is an act. much used. & proceeds upon the ground that the property was found but it is now used in all cases in which property is taken without upon mere to manner of taking.—

The first case is where Deft. came wrongfully by the goods here it is concurrent with trespass & the same evidence supports both actions.

2d class of cases is where Deft. came lawfully into posst. but exercised an act of ownership which he had no right to exercise. trespass does not lie.

3d class is where the flagrant act of ownership is not apparent. but the owner does not know what Deft did with the article. from demand is necessary & refusal to deliver is evidence of conversion. in the former cases there is no necessity of demand. In this 3d case Demand & refusal is not always decisive evidence of conversion. thus suppose one finds a watch. & the owner does not exhibit evidence

Portion, set in plus commercia.

of ownership to the satisfaction of finder. So if the prop.
cannot be given up without great damage. Lumber
rafts drifted upon valuable land in Middletown. for no
proof of intention to convert. These facts would justify the holder in
not delivering the goods

This action is confined solely to pers. prop.
so that corn standing cannot be trovered. but if gathered
it might be. – Trespass will lie. So if one takes apples
from a tree it is only trespass. but if the apples lay on the
ground it is felony to take them. So cutting & carrying
off tree is trespass but if the tree were already cut to
take them would be felony.

Plff must state that he had
poss.y & prop.y that the Deft. came in poss.n by finding which
means excludes any manner of getting poss.n & then the con-
version must appear. Demand & refusal need not appear
upon the deck. for that is only evidence of conversion but
it is not always conclusive evidence.

An actual poss.n
is not necessary to the action. it is not indispensable. if
poss.n is proved it is enough for it proves actual or implied
poss.n

The effect of judgt. is to vest the property in Deft.
the damages are a satisfact. to Plff. so if two trover on
article. a judgt. agt. one vests the prop. in him.

But if horse
or other trovered article is returned before ult. bro. to

prop^y is not vested in Def^t the return goes in mitigation of damages. Ball. N.P. Esp. D. 5 Bac.

If prop^y was bailed the rule is the same as laid down under trespass. The bailee is not allowed to sue for the trover because of the certainty of his liability to bailor but because of the nature of the bailee^t which is such that he may be subjected.

If A bails cow to B. & A comes & takes them away. I do not know why A in this case is not a trespasser & lessor may be a trespasser. the law is common that neither trespass nor trover will lie agt bailor.

Suppose B by fraud obtains poss^n of A's prop^y. B is a bona fide purch^r — now if B stole it there is no doubt but A might sue B. but if A were deceived he could not recover of B. for he was mist^d himself to be gulled. the maxim of qui prior est in tempore potior est in jure applies only when the equity is equal.

Collateral articles if stolen as horses be will not pass by sale if they have been stolen but money if stolen will pass. because it is a currency & this is the only reason. if otherwise commerce would be at a stand. an action then will not lie for money unless invested so could be identified. Rex v Millen. in Barr. Bank bills. negotiable notes. specie be stand upon the same footing.

In all torts agst. is a complete satisfaction, altho no ntr. is taken out. In contracts on the other hand. if there are four are liable you may get judgt. until you get satisfaction — If it were so in torts litigation would be encouraged.

It is gnl. laid down in books that there can be no other plea under the recepts rule 11 and gnl. issue. This is not true in practice & I see not why other pleas might not be made. Under gnl. issue any thing may be proved that destroys the right of action.

There are cases in which the courts have allowed articles to be brot. into court as pictures, jewels &c.

If property is owned jointly one owner cannot bring trover agt. the other. there is no conversion such has a right to him. There is one exception if. One tent. in common has destroyed in which case trespass or trover may be brot.

We have stat. enabling one tent. in common to have action agt. the other. whether the propty. was real or perl.

If an injury is done to partnership property if one partly sues the Defdt. cannot take advantage of the nonjoinder under the gnl. issue, he must plead it in abatement. Pinn & Lewis 5 Burr.

Could it seem to me that nonjoinder might not be a bar to the suit, because it is no damage to Defdt. the proprs. will be a bar to a subsqt. action for the same thing as when the same evidence is required.

If one draws off 10 Gals wine & takes it away leaving the rest. one should not be liable for trover for the whole pipe but if after drawing the 10 Gals. fills it up with water. the whole pipe is converted. Now I should suppose that trover lay for the 10 Gals. & trespass for the remainder. But it seems settled that such an alteration in the property is conversion.

It was determined that if property were taken which belonged to feme sole & converted after marriage. the husband may join the wife. The transfer took place before the conversion, the true reason is says judge R. that when the wife's propty. is the mentorious cause of action the husb. may join his wife if he pleases.

Poss.n is prima facie evidence of propty. & may be rebutted. –

The unit changes the L.a L.s with trustees.—

Replevin —

A replevin may be an adversary writ. or it may be only an pr. to recover back your propty which has been attached or distrained by substituting a bondsman

Distraining was a lawful instrument in the hands of Landlords to recover rent. We have no such power in this country except perhaps in large towns where the landlord has a lien upon the goods & is to be paid before other cred.s the object of it is that distrained persons may find shelter.

The precept is to take the cattle for other articles with a warrant & keep them until the rent due is pd. Here the tenant gets a bond man to answer the judgt upon the writ of replevin in money or to return the cattle.

The 2d kind is when the cattle are taken & impounded. being taken damage feasant. Bond is given to answer all damages & the owner recovers his cattle. If the bond says there has been no damage done &c. the cattle being unlawfully impounded. Replevin becomes an action of trespass in it accrues.

By b. & L. all propty upon that state was pledged for the rent. not so but that he could sell it. but it was a pledge as long as it remained. — the L.d Lord did not sue to recover judgt. but went with a warrant to distrain. to prevent oppression an antient stat. allowing the tnt to replevin. this writ directs the Shff

to take the cattle & replevin them to the tenant. this writ is precisely like a writ for trespass. or bondsman binding himself to answer the writ or return the cattle. For this writ is brought to claim for rent. if rent is due judgt is rendered for the Lord (the Deft.) agst the Pltff in replevin the tenant. If no rent is due, judgt goes for Pltff in replevin precisely as in case of trespass. So if the cattle were impounded if the fence was good. or cattle did not get in Pltff in replevin recovers as in trespass. The writ charges defdt with having taken the cattle with force & arms and impounding them. Hence the double purpose of remedying different like Hindoo sword. to dig parsnips. & use a man thro gently. –

2d case where this writ is used is common throughout the US. where finds cattle in his lots. may either sue in trespass or impound & when impounded the cattle are considered in the custody of the law. then the cattle are released by compromise. or an replevin. when Pltff enters bond & summons the distrainer to appear & answer to the trespass. If found agst cattle were guilty & ext. goes agst him which if not paid. a suit on the bond secures it.

There are certain critters not commonable & others that are by b. L. Commonable creatures are neat cattle. sheep. if these get into a lot where running in the street & when the fence was good. they are liable to be impounded, But horses & hogs are not commonable. no right to be in the highway. & if they get in. they are liable whether a stick of fence or not.

We have boy laws allowing hogs to be in highway if yoked & ringed. By L.C.L. there was an offr. appointed to take them up if found in highway. & all the privilege allowed is that they shall not be arrested. & if they get out of highway over a fence were so bad the owner is liable. so decided in Kenn. supt. 6th.

As to land not joining highway it depends upon this. where fence did the cattle get over. C.L. does not contain a legal fencing. The height & quality of fence is to be determined by the jury if no express stat.-

There is no law relating to geese & turkeys the way is commonly to give notice & if not removed. kill them. that is they cannot be impounded. - An action lies for the trespass they do. but not this summary method. I imagine the killer would not be liable if he sent them home.

Impounding is a temporary suspension of other remedies. if the cattle escape the pound keeper is liable. (the law is like that of Gaoler & Escape.) or the party may distrain again.-

This replevin is of great use. where prop.ty is allowed to be attached for debts.

Levari facias. A attaches for $1000. & gets only $500 worth property & B gives bond. & when judgt. is recovered for $1000 & delivers up the property to the amt. of $500. On a bail bond altho the bond is supposed to be forfeited if the Deft. does not appear yet if he is delivered up to Exon. the bond is assumed to be bound thereby if $500 worth of prop.ty are delivered up the bondsman should be discharged.-

for the parties are in the same situation as after attachment the object of the law is attained. for Pltff is placed exactly as he placed himself.

Trespass on the Case.–

This action lies in three classes of cases.

1st For wrongs not accompanied with force. 2d for consequential injuries occasionally acts accompanied with force 3 for injuries arising from wilful omissions.

The 1st wrongs not accompanied with force were considered when we consid.d slander. malicious prosecution trover &c. which are actions on the case. in trover the force is waived.

As to 2d Kind we have an example in cases by a master, servant. the mast.r has trespass vi et arm.s the beater. the master has case for gross. Esp D. 598. 3 Bl. 153. 2d Ray. 1399. 2 T. Rep. 167.

3d class wrongs are one is bound to do a certain thing & does not do it. as a pyriter is bound to sign a writ endorsed in a discontinuing case so if a clerk of town refuses to record a deed. or in case one is bound to keep a ditch open. case lies in these cases.

This action was instituted by Wm. 2d. It has been said that an act. for escape lay at C.L. but there exist

3 Bl. 208
1 T.R. 467
2 id. 231. 648
Stra. 634
2 Bl. R. 1155

Co. Litt. 81

says nothing of it. I presume it was not known. Our case gives give discretionary damages.

Where there was a remedy by comm. law & an other remedy was given by stat the rule of damages must be the same under the C.L. Statut. Now if the remedy existed before the stat 13 Ed. 1 the rule of damages is diff. from it would otherwise be, provided the stat did not ascertain the damages.

All the difficulty is knowing what is immediate & what consequential. This is explained in the regular case. Can the loss a mad ox. the court held trespass vi. lies. they held the man to use the wild bull as an instrument. 2 Will. 174, Stra 638. Esp. Dig. 698.

A man rode a horse into Lincolns inn fields & the horse ran away & did damage. he was held liable in case. Com. Dig. 208

1 Vent. 295. 2 Lev. 72.

Where the person is literally the agent it matters not whether the act concerned or not if done with force. is it assault lies. if commanding a man to do a wrongful act but if the serv. was about his master business & does an injury agst. his master will case lies.

J. Pitman says that if J.S. throws a ball which by bounding & rebounding breaks Nokes window JS is liable. but a rational agent coming in would take away JS's liability.

If a master order his serv. to do an act he does it injures a man the master is liable in trespass. but if we order from the

1 East. 106
6 T.R. 125
2 H. B. 442

Comp. 406
2 Bl. R. 832
East. 603.
2 T.R. 154

8 T. Rep. 188

master would in some cases be liable in others not. As the old law stood. If a servt. was about his master's business or driving his carriage & does an injury wilfully the master is liable. but if the servt. left his master's business to do a trespass. the master was not liable. 1 Salk 441. 5 T R 648 Burr. 562

But in the case in East it is held that a master is not liable for the wilful torts of his servt. The court did not mean to impeach the old principle. they considered a wilful tort, not necessarily done according master's orders, to be an abandonment of master's business. But I see no room to distinguish this case from that of Sheffs & Dept Sheff which is well decided, the abandonment is as complete in one case as the other. See this question discussed in Rivers. Dom. Rel. & Gould's Dom. Rel. "Mas & Serv."

Take it the old law is established in this country that case lies agst the master for the wilful torts of the servt. if the act. is agst. the servt. trespass is the remedy. 1 T. R. 279. Stra 1083. Burr. 2093.

So if an injury is done by the dog case is this action. it is P. that if the owner is knowing that the dog is wont to bite. his p. lies that only lies however when the master sets on the dog.

There are several diffr. classes of cases in which case lies. It is the proper remedy when damage is occasioned by a crim-

Com. D. 166.
9 Co. 5a
1 Bell. 90.5
3 Bl. 166

Should not be liable in subjecto if he did not know.

inal omission of some act imposed by law (not that imposed by contract) as if one finds any thing & does not take ordinary care of it. so if one officer neglects his duty as by not serving writ Cro Car. 917. (contra. Co Lit. 214 a) (law) 1 Com. Dig. 206. 1 Roll. 93. 1 Bac. 366. 1 Sal. 328 Doug. 42.

It is almost universal that where undertaking to do an act professionally he is liable for any neglect in case. but if not of his profession. he is not liable except on the special agst. there is no remedy if not in the profession & this is founded in policy Cro Car. 214. 2 Wils. 359. Esp. Dig 601 3 Bl. 122. 166. 1 Com. Dig. 165

It has been questioned whether this action lies agst any one who injures the health of another. by the act of another in his own business. As of wine. if the seller did not know it to have been adulterated there is no criminal liability. the law is liable on the warranty implied in the sale. as to the warranty the rule is not where laid down except in Blackstone. the maxim of caveat emptor is in some cases too much extended. I should say that when one sells mouldy corn a action lies. there must be a quid pro quo. tho there may be no wrong. no fraud.

As to Dis. on cas. for injuries done by cattle if the creature never did wrong before the master would not be liable but having once bitten he is liable for subsequent damages. as where the dog bit when trod on. having bitten one

Cean. 208
4 Co. 18
1 Roll. 4

3 Bl. 165
2 Bac. 245
1 Show. 175.
Cro. Eg. 1 v. 625
2 T. R. 126
2 Sa. 873
2 Bl. 1048

Cro Lib. 141. 196
2 Wils. 313.
2 Mod. 31
8 Co. 146

If Deft. were actually committed to the walls on mesne process the wh is the reason as if committed on final process. Esp. 110. 4 T. R. 789

before in the same circumstances. But if a breach is in its nature fresh in nature, the owner is liable in the first instance. 2d Ray. 606. 6 co Cobb. 254. scienter may be proved under gen. issue.

Trespass cont. lies for disturbing right of way or right of water. 9 Co. 112. 1 Vent. 275. 2 Vent. 186. Stra. 5. 638.

This is the actn brot. agst. Sheriff for an escape whether on mesne or final process. if on mesne process it must be case. if on final, debt lies for the sum is in that case ascertained. It has been said that case would lie for escape before st. 2 W. st. but I do not believe it. the fact was an offr. was made liable at First at 1 Ed. 1

An erroneous judgt. is good formd. to subject Sheriff because a judgt. cannot be attacked in this collateral manner. it is good until reversed. the Sheriff could not impeach the judg.

When a person is received on mesne process the cred. can maintain the action agst. offr. unless he neglected his duty. because he is not supposed then to have prope executors. Sheriff is a trespass. but his liability does not increase the damages

But in final process the offr. is liable & he may recover for the fees & insult and also for the amount of the debt. the Sheriff is always suppd. able to keep a prisoner arrested on final process. the cred. may see the mesne, if he does he waives his right of actn agst. Sheriff

Erp. says that for escape on mere proof, the question of Shipp's liability depends on the fact whether Pltff were thereby delayed in his suit. –

Some confusion here where the body is determined not good ground of action after the rescue.

Watts cannot recover the whole freight in ordinary. If an insurer is obliged to pay twice he may recover it back.

If a rescuer serve process cred. may sue the rescuer. (not the Pltff) unless he had been guilty of breach of duty. if no collusion. & he may return a rescue & this is good evidence. —

If a ptff. sues rescuers the jury may give such damages as they please the rescuers may commit court throw that the person rescued is a man of property &c. they will be subjected for servant wrongs which will not lessen the debt. the whole of the sum may be recovered of the debtor or Pltff. But if no such proof were had & the body could not be had against the jury will give such damages as to the amt. of the debt. in satisfaction &c. for if the whole sum is given it goes in satisfaction of the debt. but if a less sum is recovered it is damages for detaining the pltffs satisfaction. The Pltff then must show that debtor is insolvent or act of wrong of process.

Suppose Pltff sues. his action is trespass vi et armis. the cred. can recover the whole sum. & the cred. is not obliged to sue the Pltff. No man can have but one satisfaction. Pltff is not compelled to wait until the cred. sue him the point being settled that mere liability gives a right of action in tort. Bro. Elg. 53. Esp. Dig. b. 1 c. 1. 15

Esp. says that if both Pltff & cred. bring actn. agt. rescuers the action of Pltff is suspended because the Pltff has waived his right agt. the Pltff. but this I doubt be cause merely bringing action does not discharge Pltff. Pltff must be satisfied.

The Sheriff may by his act of escape be an accessory so if it were an escape from execution but the rule of damages would be diff.t this action is cases aft.t the escape it is trespass.

In case of vol.t escape the Sheriff can not sue the escapee it is a rule of policy. he cannot. pursue for he cause after negligent escape when a retaking will secure him if he does it before action brought

suppose the under Sheriff suffers vol.t escape can the Sheriff sue the escapee? he is clearly liable as well as exp.t to the cred.r by the former case it was said that he could not but mod.n cases say that he may sue either the under Sheriff or escapee. Lev. Ely. 399.

By L.C.J. the really antient stat. there were two kinds of escapes vol.t. negligent vol.t escape is by the consent or neglect of Sheriff & negligent escapes are all actions except those assumed by the act of Gedor of public necessity. The Sheriff is liable in both cases. the difference is that if Sheriff retakes before sec.d brought he is not liable. but not so if vol.t & Sheriff should retake after vol.t escape he is liable for false imprisonment. What is vol. escape? prison.r escaped by forcing out a door. was retaken & put in same place & not repairing. the prison.r escaped held to be voluntary. A bond taken to keep prison.r within the yard is held a good bond. so the escape from it is not vol.t if prisoner

Esp D. 617
1 Wils. 325
1 Salk 86
4 Burr

Hutton 125
3 Wils. 377

runs over the Sheriff must shut him up or the next escape is vol. If pris. runs out & back agt. before act. brot. the Sheff is not liable so that on the bond only nominal damages are recovered. 2 T.R. 126. + stict contra by Holt.

Cred. bribed the man to escape. as. bro. soon after the prison. returned. Cred. recovered nothing by the suit. Sheff sued on the bond but recovered only nominal damages.

This act. is the proper one to be brot. agt. agents Atty. &c. For mere ignorance or want of skill the lawyer is not liable. but for a breach of trust or negligence he would be. want of skill just. subjects, but perhaps disagree lawyers must be expected to mistake. The Atty. may be liable to his clients adversary as for fraud &c by which he brot. him into difficulty & that altho it was all for benefit of his client if he has p. it over to his client he will not be able to recover it back. his tort prevs.

There is a diff. in sustaining this action agt. Physicians. 3 Wils. held liable for event of an experiment.

1 Lev. 328 Justices & magistrates are liable for neglect of duty. or refusing to sign a mit. in a case not discretionary. refusing to take bail or an acknowledgment. The act must be ministerial act. for if judiciable act. does not lie, if the off. has jurisdiction, given & neglects in some ministerial act. he may be a mistake.

Hill Exp. 603. Nutt. 120 Shff not liable for taking insuff. bail as the act was judicial. the Shff could not refuse any bail off. on the ground of insufficiency thus screening his mal practice

3 Salk 303. 44
1 T R. 651
Esp D. 623

8 Co 32
3 Bl 133
1 Ey. 66

leaving horse constitutes a guest. & the Innkeeper may keep the innkeepers goods as a pledge for his bill. 1 Salk 388.

A Shff. must judge of the sufficiency of the bail offered at his peril. The coroner & jury must judge whether suff.t or not tho they will not be nice. 1 Hawk. 90.

This act. lies for breach of trust in bailee. ex delicto as well as ex contractu. 4 Co. 83. 1 Salk. 26. Esp. D. 618. When a cargo is lost by negligence of master &c. young one may sue or all of the owners. for it is a tort. it was once held to be a contract but decided to be a tort

When an offr. employs others under him, he is liable for their acts. There is an exception in the case of the port master. there is no contract between the sender & the port master. if he neglect his legal duty he is liable Salk 17. Cowp. 754 Esp. 624. 3 Wils. 443.

This is the act. bot. agt. Innkeepers when prop.t is lost at an Inn. The innkeeper is excused by the act of God or public enemies he is however liable for losses by thieves & robbers & in cases where common bailees would not be, & this is to prevent collusion between Innkeeper & robbers. But if goods are deposited & the guest does not stay until then the Innkeeper is liable only as another man would be: Lowe 135.

The person entitled to this remedy must be a guest. transient. traveller. not a neighbour who calls to stay all night. nor a boarder for a length of time. (he must pay as travellers do.) Moore 78. 8 Co. 3. q. 5 T. R. 273. not a friend staying there

6. Dec 188

Dec. 8 188
Eth 6 28

Dec. 8 327

Full Pro
1 Dy. 158
9 Dec. 87.
3 Th. 166.
2 Ehrm 327

For innkeeper must also receive some profit from the guest or his goods as a horse. for this he would be liable. but not for a trunk receiving no profit for keeping it. 1 Salk. 388. tho he might be subjected as bailee. As to the horse receiving other goods the authr. disagree. The guest is a lodger for his keeping. the horse for his keeping. & I should say the horse for both as the person of the guest is.

Suppose one lodges his goods & goes off. the goods are lost. the liability depends upon the fact whether the person came there as a guest. It is not every temporary absence that destroys Innkpr's liability. —

Insanity or sickness is no excuse for an innkeeper. if he receives guests. He is not liable for injuries to the person as battery 8 Co. 33

Like a gaoler & common carr. he is liable in all events and like them too he has a lien upon the person &c. He cannot refuse any guest if the room is hindered and his house is full. (that his family is sick. when he must take care if any)

The Innkr. may take the person without a warrant & confine him. but I conceive that this could not be done if there were a house because the object will be accomplished without restraining pers. liberty. — Innkr. may get his friends to assist in securing him.

1 Rolle 99
Yelv. 20
Cro El. 9
Hob. 211

2 Ch. Rep. 118.

iv. ante
§ 31. 155

This action is the remedy for frauds or deceits in the sale of goods.

In the place for false warranty there is no necessity of case founded in obligation or delicto the party may sue on the contract. But if the party knew it false this action lies. If seller did not know it does not lie. for there is no fraud to found it upon. 1 Com. 166.

False affirmation. if known to be false when made the action lies. but action of fraud will not lie if the party did not know it to be false. There are exceptions however, in case that, a ordinary man would not be deceived. If the defect requires close examination there is no excuse. Scienter is material. 3 Bl. 165. If purchaser incapacitated to discover the defect then would be fraud. –

A man will be liable now when he would not formerly have been.

A mere matter of opinion will not amount to false affirmation. as that my horse is worth $200. Or you can get $200 rent &c. But if the statement were matter of fact it may found fraud. Thus if yesterday offered me 100 for this horse or $250 rent last year. This may be foundation of fraud. So if one says that wind gall – doesn't hurt him I said him all summer & it did not impair his strength &c it would be fraud.

Rule is that what a man is bound in good conscience to disclose he must not secrete

Esp 632

Decided by Roman courts to be a void contract. —

Both parties were ignorant. Cont. court set it aside on ground of fraud. But U. S. Ct. set it aside on ground of prima facie non by counting

There once was when concealment would not subject. but now a man be subjected for concealing defects. One neighbour bot. a horse that he thot. he knew all about had often tried to buy him. & did finally without any thing being said as to faults. it was proved that seller knew of a secret disease of which the horse died. the court held it to be a fraudulent concealment.

An unsound article is sold for a sound price. I think it going too far to imply a warranty when the seller was guilty of no fraud. — no scienter. or no ar. fraud. It has been so that the buyer must lose it. But Eq. say that such a bargain is void. Ch. says that if the thing which is the sine qua non of the contract, not there the contract ought to be set aside. the minds of the parties do not meet. as the sale of the girl for a boy to both seller & buyer being ignorant of the fact, so the sale of the land for the purpose of getting possn of a salt spring. But if the point about which the parties were disappointed is merely incidental or a pleasant thing the bargain will stand.

In all this easy case is the remedy. but not founded in fraud. & recovery be of the damage suffered.

In case occurred in Court. of sale of Virginia land set out & described as bottom land. but which proved mountainous

Gro. Jac. 474
1 Show. 63.65
1 Salk 210
1 Foub. 109.37
Carth 90
L'a Ray. 590

Parliament contended that the party could not recover unless after they had determined his right. but the court overruled

In all cases there is, in sales of pers.l prop.ty, an implied warranty of title. It is said he would not be liable unless the seller knew title to be bad: if so there could be no implied warranty.

This act. for fraud lies for making a false affirmation (3 T.R. 51) concerning property in which the affirmer has not the least interest. So concerning the credit of another. Bartholomew & Clark Days Rep.

So for affirming the name of another, to get credit, or for any other trick of this kind 1 Com. 167. Esp. 633. Co. Elz. 90 Bull. N.P. 32. 1 Lev 247

So cheating a person by false cards is actionable, if playing is not agt. law. Co. Elz. 90.

Altho you may sue for fraud affirming the contract, you may also sue in trespass disaffirming the contract. As if A takes B's horse, you can sue in trespass or trover or if the horse is sold, in agt. So if counterfeit money is p.d for a horse, you may take the horse where you find it, or sue in case for the fraud if he knew of the money being counterfeit.

This is the action when an individual has been injured by the infraction of a public right. In this case that special damage must be alleged. As where an inspector of elections should refuse to receive a vote. the voter or the candidate may have an action. once disputed but it is now settled. 5 Co. 72. 1 Salk. 19. 3 Salk. 17. Esp. D. 627. 528. 1 Salk 502. 6 Mod. 45. 49. 1 Wil. 122. K. B. P. 62

4 Burr. 303

An obstruction by a stranger to a process lays foundation of an action as to shut up goods. Here the offering to break down.

Geo E. 908
Geo. 98. 93

In 7th Wm. & Mary it was enacted that where a false return is made he who should have been returned shall recover double damages & costs.

Case will lie agt. an offr. for a false return in an inferior court, or for making a false return to a mandamus

Case lies for violating an author's right. The question was whether an author has any right at C.L. When he had published their works others published them. It was felt to be an injury but supposed to be without remedy. And authors commonly applied to Ct. to grant injunctions to those who attempted to republish. A great question was whether there was any C.L. remedy & if there was, was it taken away by the stat. granting exclusive privilege for 14 yrs. The 12 Judges decided there was a C.L. remedy but that it was cut off by stat. 7 to 8. I conceive there was no C.L. remedy. but if there were I conceive the legislature could not take it away.

It has been made a great question whether one abridg. is a violation of his right (2 Ca. Ray. 739.) It is decided (Ch. 441) that if it appears to the court upon the face of the work it is a violation. Sure as to a translation?

There is no form for declaring in this action except trover & perhaps slander. you state the case at large.

1 Salk. 229

1 Vern. 176

3 Bac. 860

Burr. 1267.

4 Mod. 281-2.

Of Mandamus. The object in this writ is a specific remedy very like an application to Ch.
but it does lie where a bill in Ch. does.

It is issued from B. R. here from the supreme court. the object of it is to invest the party with some right which is taken from him or withheld. It relates to some public act. as recording deed. If you make a bargain with a man to deliver you 100 bush. wheat. you must go a court of law Ch. will not interfere to bring pur. It lies when an inferior court will not try a cause. So where an officer he is legally chosen to some office in a corporation. this must be tried it is done by a mandamus. So an inferior court may throw one over the bar. An inferior court may by a mandamus restore him to practice.

This does not issue to compel performance in an individual capacity.

This writ is demandable of common right. it is not discretionary with the court if proper evidence is adduced. it must be issued and without bond. Is if a corpn. to refuse to perform a duty required of them by which an individual is injured.

You can use a town for it is a corpn. in law. but a county is not. so if a Co. owes you. you must by a

mandamus: which orders payt. if he returns no money one other issues to all the justices ordering them to lay a tax.

Any offr. who holds an office concerning the publick. is mandamus issues. as if a Ld. of probate should refuse to appt. P.L. admr. Cowth. 4 5 7. 1 T. Rep. 631. 1 Co. 94. 1 T. Rep. 2 Ellis but not unless specific relief is wanted.

A Corpt. aggr. is not a corporation. as for a library. 2 Salk. 475. 1 Will 1. 4 T. Rep. 125. Doug. 584 628

Of proceeding. The clerk would not record P.L. and damages might be recovd. in Ld. of law but that would not give title. Ld would not interfere because there was no contract.

By C.L. P.L goes with an ex parte complaint accompanied with affidavit. a summons then issues to the clerk to show cause. if he appears & makes a return which is not suff' a peremptory mandamus issues. if the clerk returned that no deed was ever delivered to him. this by C.L. was conclusive. the party then sues if he phases at law. if he recovers. judgt. for damages goes agt. the clerk & a peremptory mandamus goes with it.

There is a state of chancery & a similar one in some states allowing the party to traverse the return & a peremptory mandamus may then issue as the case may be.

1 Lev. 69
1 Sid. 86
1 Vent. 111
3 Bac. 225

11 Co. 99
Cart. 179

Stra. 808
1 Lev. 86

If the party makes no return at all nor appears a peremptory mandamus issues & the offr. is imprisoned for contempt.

Appn. for mandamus may be made to the court if in session or to one of the judges if not, with affidavit which is always in writing. — A return is always made on the.

If first mandamus issues agt. all only part are engaged in the false return, part only are punished & if part only refuse to obey the writ of Mand. issues to them only. 3 Bac. 547. If the party brings an action for false return, he may run only one or two or all. Juries will decide the character of the return.

If a peremptory mandamus issue & not obeyed the party is committed on process for contempt. As to the power of the court in this case the court may keep the party in gaol until he does it, if it is for life. When the commitment is for contempt in abuse or disturbance of court the imprisonment ends with the session of the court. Process only issues agt. the majority in the majority but the minority. — Bac. Ab. Tit. 145

Hard. 275
2 Ld. Ray 1208
Barnd. 428

If prohibition issue the origl. Pltff is obliged to pay costs of all proceedings & nominal damages.

Cro Car 559
4 Bac 262
1 Vent. 348
3 Lev 360

In an attachment upon prohibn. Pltff shall recover damages & costs agst. the party for proceeding after the writ of prohibn.
4 Bac. 262

Prohibition. may be issued from any of the supr. courts in Wst. Hall. by our Supr. cts. It is meant to prevent inferior cts from proceeding contrary to law or in cases where they have no jurisdn. 3 Bl. 112 4 Bac. 240. 12 Co. 6 4 Com. 487. 1 Ken. Bl. 100.

It issues not only agst the cts but agst the Deft in the orig. action also. The mode of obtaining it is much the same as obtaining an injund. It may appear from the face of the proceeding that the Ct below has no jurisdn then there can be no difficulty in issuing a peremptory prohibn at once. But it may depend on unknown facts. Here affidavits become necessary. A rule issues to show cause why prohibn. shd not issue. The cts there & parts are forced to show cause if it is suffn. there is an end of it. 1 P.W. 476. 1 Sal 549 2 Ld Ray. 211. Hob. 57 If not suffn. a peremp. prohibn. issues. 2 Ld Ray. 220 If disobeyed the attachment issues. The inferior cts & Deft are committed.

It may be questioned whether the court has cognizance. the Deft. then institutes a fictitious suit in which he sues out for not obeying the prohibition. the question is then found. the party had procured the prohibn. the court also suspended the proceedings. if the complaint succeeds a peremp. prohibn issues. If he be disappointed an order to proceed issues. 3 Bl. 114. 4 Co. 70. 517. a writ of consultation

A commencement of same suit after and before same court is contempt in Deft. if in court if the court proceeds.

1 Jac.

Co Lit. 29
Co Litt. 243
Mr Jones 378

1 Roll. 306
1 Lid. 43

Audita Querela. This remedy is wanted when one is pressed with an ex. but on day in court at the attys he has a good defence. as where it was paid up. or release or arrested &c. The process is vis gerens. the party offers to pay judg. & the hearing is ex parte. the injury the writ is discretionary with him. If issued a bond is taken from a responsible person to answer all costs damages &c. The writ contains a recital of all proceedings & voids all former process. discharging the body goods &c. & all remedy after that is on the bond. If Deft. is ex. recover in the suit which always follows he recovers damages & a discharge. If pltff sues him the remedy is on the bond. two defence is good to the writ & plaintiff a court renders judg. immediately. Bonds in no case except the replevin & discharge cases. the bond on writ of error does not release from jail.

This remedy is frequent when the party is deprived of the use of his defence by the misconduct of the Pltff in any action or by employing to withdraw suit according to promise.

The C. of C. B. issues this writ in Eq & by the C. of C. Pleas here. I presume a judge of any of the courts might grant it when stat. did not interfere. the course in Eq is singular & not explained.

Quo Warranto. This is where some person claims exercising some franchise or right which it is contended he has no such right to exercise. As if a alderman or the corpn or f.f. thus says he was chosen. but the attorney & corporation person say he is not. the question is tried upon their writ.

So when one holds a fray or a mill which the complainant says he ought not to. Yelv. 191. 2 Roll. 265. Cro. 115 299. Cro. 527. 544. 561. Lord Raym 1559.

If ag^t body corporate it goes ag^t all. by cap. mem. or admitting 2 Bur 8691 2 Roll. 151 the body. & proc^s is mulct in behalf of the public. 1 Leet. 174. 1 Show 284.

2 Holt.
2 Bl 132

Habeas Corpus. There are two kinds of this writ applicable to civil, ad testificandum & ad subjiciendum. The first is directed to sheriff bring up a prisoner to testify in a certain case. the party may demand it. It was matter of question whether the sheriff could be subpoenaed if the prisoner should escape without default. it was decided by the judges that no law to be found that secured sheriff. & then a stat was made securing him in time of war which is p. to be in affirmance.

The second is a hab. corp. ad subjiciendum. this is claimed to be coeval in with the existence of Eng nation. it was regulated by stat 6 Ch. 2. Mr Denison states that by the opinion of eminent men that stat has not added anything to 6 C. except perhaps in form 3 Bl. 131. 6 & it is so considd in America. so we may not trace to know of our law.

The object of writ is to call the body before the ct to know the cause of detainer. complaining of illegality of proceedg. to bail or release. It is directed to the imprisoner & it commands all species of restraint of locomotion.

It is grantable in term time or vacation. by the judges of the Ch. B. It is a prerogative of right. but does not extend to restraint on final process. 2 Co. Inst. 52

In the stat of Charles there is a provision allowing sheriff for the writ in vacat time. The business of the court is to discharge, bail or remand 2 Hale P. C. 146 to the same or a diff. prison

There are prisoners taken this writ is not grantable, as prisoners of war. not being subjects.

1 Leb. 350
2 Inuit 55

1 Ctid. 78
5 Aind. 23

Atra 794

It has been questioned whether a neutral power is entitled to this writ. 2 Burr. 765. they being neither subjects nor enemies.

If the object is to bring up one charged with a crime this notice, if the ch. is in writing must be in writing. The writ is signed by lt. in b. time. is directed to the off. for him to bring up pris. with cause of detention. the off. must return the name of the person committing 2 Lev. 129 one alias & plurias issues sometimes. if not obeyed it is contempt. Bunb. 31.

In bon. a hab. corp. could not issue to bring a pris. from a ch. because a bon. court could not punish for disobedience.

If a false return were made to a hab. corp. the off. is doubtless punishable. as that the imprisonment was an ex. the court would receive it if ref. to have the party to his remedy. 2 Burr. 55. Barnes Rep. 156.

There may have been cause of imprisonment but an unj. may make it not by traversing the return, but upon bail as when the bail is offered after he was shut up. the question having been agitated as to right of bail in recd. case. it is now settled that bail off. after imprisonment must be accepted. & the court does not send back to off. to bail the ch. bail, on the return.

If one is confined on sentence after conviction. the writ lies if it is claimed the court that had had no power.

Criminal Law

There are certain principles in Criminal Law that are universal in all countries. — particularly in relation to capital offences — The C.L. has been modified through all the States

Crime is said to be an act in violation of some public law which forbids it. or omitting to do some act that a public law orders to be done. —

Misdemeanors are in common parlance meant something less than crime. but some of the most heinous crimes are misdemeanors. —

Any offence which is not described by some technical name is a misdemeanor, or an attempt to murder — no intention is a misdemeanor unless accompanied by some overt act shewing that intention this when this accompanied it is a misdemeanor —

So when any thing is omitted for which omission there is no statute penalty, the C.L. steps in and punishes the offence as for a misdemeanor. —

When crimes are committed there is generally an offence against an individual and also generally the public & individual rights, property, character, damages — or in offences against rights of the public generally &c.

We find in Eng Law — many crimes are committed from which an

and this goes when the ground that the private injury is merged in the public offence

injury arises to individuals & yet the individuals as such can have no reparation.

Why should not a thief be answerable to the person injured for damages — there is no reason why one should not make reparation for injuries he has committed as far as he is able. —

The reason is that in all those cases where the individual's injury is merged in the public wrong by G.L. the offender was punished with death & his property was forfeited, so that there was nothing left out of which the injured person could get reparation. — But of late years those punishments have been meliorated & and particularly in the U.S. There is no attainder of blood, and but few of those crimes which were capital by G.L. are punished with death. — So that the reason if good originally, cannot operate here. —

So too we find that in all the lesser offences, the offender was subject to damages at the suit of the person injured. —

For E.g. have you often heard of the benefit of clergy: this grew out of the wish of the courts of rejecting the penal code of G.L. — At first Clergymen were not to be punished with the full rigour of the law. & the proof of being a clergyman was the ability to read — & no date as the origin of it — no women were admitted to the benefit of clergy tho at that time it was extended to them.

"That code however is so much the better which produces reformation also" —

Crimes are divided into those that are mala in se & mala prohibita — The first are such as would be crimes in a state of nature & whether there were statutes against them or not. The others are those whose iniquity consists in transgression of the statute. —

The object of punishment is not to reform but to deter others. —

Reasons for capital punishments are two. to deter by the terror of the punishments & specifically to secure society. —

The C. L. punishments are fines & the pillory &c and not generally being proportioned to the crime as attend by statute. — When a statute is severer than the C. L. it does not repeal the C. L. but the prosecutor may prosecute on which he pleases. —

If the punishment is less it is a repeal of the C. L. & the prosecutor can never indict on C. L.

In this & some other states. Blackburn was punished both death by stat. by C. L. the punishment was much less & no practitioner would ever indict under the stat — it was not an offence in relation to society sufficient to warrant capital punishment. —

When an indictment is made on a statute where there is a punishment provided at C. L if any thing prevents

conviction on the stat. it is still good b.C.L. indictment & the C.L punishment may be inflicted.

Of those persons who are exempt from punishment for committing acts for which others would be punished.—

There can be no punishment for a person who does not a will — for in will consists the whole blame — where there is freeagency the actor is accountable — but if not there is no blame — altho there may be some fault in being induced to such circumstances as prevent a free exercise of the will —

So that when one is void of understanding he is not to be punished. —

Yet there are cases in which this rule is not exerted. — If the act was perfectly accidental it is not criminal.

So you will remember to make a man the subject of punishment there must be will & act. & bett vicious. —

and thus the will may be criminal in foro conscientiæ yet if there is no act there no crime. —

The Lunatic & idiot are not subjects of punishment. The law is however that if he knows enough to discover right & wrong he is criminal — but if he is entirely deprived of reason he is not criminal. —

An infant is never punished for any crime he may commit under the age of seven years — founded on a presumption of law that cannot be questioned. that they are not of judgt. enough to distinguish right from wrong — this is the age called in the civil law called infantia

But between the age of seven & fourteen this judgt. is to be enquired & tried and is to be determined from proof this is a doubtful period called pubertia. —

After fourteen years the plea of age is of no avail.

I observed to you that want of understanding does not always excuse as in the case of drunkenness — & still however the principle remains entire for it does not proceed upon the ground of the criminal having brought this state of delirium upon himself for then many lunatics might be punished. — But the true reason is in the policy to prevent crimes being committed under false pretences — so that one must furnish intoxication with death or other in the crime committed in that state without any reference to the alleged excuse

And I do not see how Justinian's code answers any purpose, the maxim there being qui delapsus in vino, culpabilis non est. — There would be no safety if it was generally adopted. —

When the act done was not intended if he were in pursuit of a lawful act to be no crime — and I do not see how the distinction introduced by Alv can be supported. to wit. that when the actor is about lawful business he is not accountable; but if he was doing something unlawful he is accountable for all consequences.

The fact is there is no will in either case and certainly is not accountable if done when there is no will. — This is founded in policy and seems to be an exception to the general rule and is ridiculed and I think pretty by D. Kamp. —

When a man ignorant of the real state of things is attempting to drive out robbers he kills one of his own family he is not guilty; here is no union of will & deed. —

The obligation of civil subjection is always an excuse as if an invasion law is obeyed; it is no crime — so if an enemy gets possession of a section of the country & obliges the inhabitants to obey them the inhabitants are not guilty of treason for furnishing provisions &c — but if the inhabitants enter voluntarily into the enemies service they are accountable or if they continue longer in their service their they are obliged to —

But compulsion is no excuse in case of private coercion as of master & servant

For in some cases where the wife does an act under the coercion of the husband it is an excuse for her, tho in no other case if private coercion are in case on the command of a master is no excuse for the servant &c. see tit. Bar. & fem. Rewes Sem. R.L.

There is one exception to the general rule in case of the wife, but this is no other — and there is no remedy against the commandments unless there commanded. Hence no means of knowledge, as where an officer orders one arrest under a forged warrant there is a remedy against the officer for the ofs who may be arrested.

So if labourers are sent into a field they cannot know to whom the land belongs & they are liable to be sued for trespass but have their remedy against the hirer. — With respect to the wife the law is different. — for in many cases she is not to be punished for what she does under his coercion. — If the husband is present & assisting the law presumes he coerced. — & extends to all cases except cases of treason & keeping a bawdy house for precaution sake, but if the crime is malum in se & heinous so she is answerable tho' the action by the coercion of her husband as mediator — but if it is a crime by the laws of civilized society only she is not answerable if coerced & the husband alone is punishable. —

There is also a case in which the wife is not liable but what the husband is punishable. — it is not merely being in company, he must also assist and then the act of the wife is presumed to be by compulsion in such case. —

Of stealing to relief, hungry: this is a crime in foro hominis from policy and the case is left open for the exercise of mercy — that it is a crime in foro conscientiae I do not believe —

Of Principal & Accessory —

An immediate crime can have no accessory — But there are crimes in which there can be no accessories as Treason from its enormity & the lesser crimes as trespass for the opposite reason — all intermediate crimes can have accessories —

A Principal is the person who perpetrates the act and those who stand by aiding & assisting are accessories — The only question is what act is presence — If any one is in the combination watching against interruption &c is enough bodily presence is not necessary

A person can commit a crime as principal without being present as poisoning setting trap — turning out a wild beast without any particular object. There he is a principal, when absent. Foster 350. 3 Co. Inst. 52. Hale PC. 615.

If there is accessory for the actor to be present to do the act he alone is principal who is present.

Accessories are of two kinds before & after the fact.

An accessory before the fact is one who advises commands or procures a man to commit the crime and is never present at the commission —

Sometimes he advises to do an unlawful act and something heinous follows — as if one commands another to assault B. & in doing this B is killed

But if C had been robbed the adviser would not be an accessory

It is now settled that the adviser is an accessory to every thing that takes place as a probable or necessary consequence directly springing from the deed advised. —

Again if one advises to commit an act it is immaterial in what manner it is committed he is a an accessory before the fact. as if shooting be advised & the object is poisoned the adviser is accessory to the murder. If he were present at the time of commission he is a principal, but the advice merely makes him only an accessory. Hale. 615.

An accessory after the fact is when a person knowing the facts conceals the criminal — helps him away, furnishes him with the means of escape &c — It is not every act of charity that constitutes one an accessory. — but it must be an act that has for its object the escape of the prisoner from the hand of justice —

He is an accessory after the fact who receives the property acquired by the commission of the crime as a receiver of stolen goods — it was not so at C.L. but by a very ancient Statute & is since made very penal Hale 618. 2 Hawk 319.

To make a man an accessory after the fact the crime must have been completed. — He may be guilty of a crime but is not an accessory of that crime as if one receives or shields one who has been wounded with a wound which death causes — he is not accessory to the murder if the act is done before the death. If an is an exception in favor

1 Hale 621

On the other hand if acquitted when tried as accessory he cannot be tried again as principal. — Vat Law. 4 Bl. 40 — thus quoad.

of the wife who may be an accessory before but not after — But the law is not so in relation to a married child — in case of husband & wife the presumption is compulsion — One would suppose it should extend to parent and child but as the governing principle is compulsion & not feeling it cannot.

2 Hawk. 320 There is such a thing as a case where there can be no accessory before the fact as where the act is unpunishable —

C. L. punishes an accessory as severely as its does a principal that, the punishment of accessory under, has been left by statute —

A good reason is that no one can be tried until the principal is convicted & the guilt of the principal cannot be tried in the trial of the accessory —

If one is tried as a principal he cannot be convicted as an accessory at the same trial — the offences are distinct, the reason of his acquittal might be that he was an accessory — But if the principal is otherwise convicted this same man may be convicted as accessory —

I shall now notice particular crimes & show you the C. L. which is the foundation of all laws on this subject — the constitution of the crime is still the same — the statutes may vary the punishment and the definition in some small degree

(4) The truth is that the probability is if the out house is burnt the dwelling will be endangered.

Arson is defined to be at C.L. the wilful felonious malicious burning the house of another. 4 Bl 210.

It must be wilful. for if it was unintentional. or thro negligence it would not be arson.

It must be malicious - the legal signification of this word is that, it be with a wicked motive. & it is not necessary that the actor should have any ill will to the injured - the latin word malitia is much better than by our English - it is the bon dom malo animo. - Hale 615.

The word house in the definition has occasioned much dispute - the latin term is domus - a dwelling, house - & if the house burnt by C.L. is not a dwelling; it is not arson the statute have made it so. - 1 Hawk. 155.

Out houses within the curtilage of the dwelling house are considered parts of the dwelling house & the subjects of arson by C.L. but a distinct house is not. (d)

Some states have made it arson to burn others but I believe no State makes it arson to burn a barn by itself unless it is filled with grain.

The Eng. law is undoubtedly that it is not arson to burn any own house - Our statute left out the words "of another" yet still our behavior cost

And so if not mutiny for the act is illegal, its but so — Contrary to the analogous case of Homicide

have decided it not to be arson to burn one's own house yet by the Eng Law if a neighbours house is destroyed by burning one's own it is arson — if done maliciously 1 Hawk. 166. Co. 6 Rl. 377. 1 Hawk. 166

Suppose according to Eng Law that the lifer or liferer burns the house — the decisions have been contradictory.

I suppose it would be arson in either of them if done with malo animo — it is the whole house & more principally perhaps the dwelling house of the lifer — Hale. Crim. Law. Tit. Ars.

The least possible burning ~~in burning~~ is sufficient to constitute arson, even tho it went out of itself if the fire was set in malo animo.

If A intended to burn B's house & by mistake set fire to C's it is still arson —

The C.L. punishment is death without benefit of clergy — In many states it is death, in other penitentiary confinement — In our state it's confinement in prison gaol which life is no dearer than when it is death — as if fire is set to a house with a family in it. —

The law of N Jersey is the same as that of Con. and in one trial there for burning a barn, the criminal life depended on which way the wind blew. —

9. The principle is that there is not so much danger & terror in an attack by day as when the world is at rest.

Burglary

Burglary is the breaking & entering a mansion house in the night season with an intent to commit a felony — all these are necessary to constitute burglary — it is not necessary you will observe to actually prove the actual commission of a felony —

Felony in Eng is a crime which is punished with forfeiture of all estates & punishable at C.L. with death. — .

We then mean in our indictments by the word felony that offence which is followed in Eng by forfeiture of lands goods & chattels & the punishment of which is death.

What is meant by night season? — it is not night when a face can be distinguished by the light of the day — It may be felony altho so light from the moon that a face might be distinguished (8) 4 Co. 6. Moor 660. 1 Hawk. 160. Cro. Eliz. 583.

What is meant by mansion house — it is a house in which some one dwells. — so by C.L. a stow or a house not inhabited is not included. —

A church is a mansion house or included in the term. 1 Hawk 162

But the house is sometimes dwelt in and sometimes not

for the law is not scrupulous in favour of rogues. –

" Stra. 884

it is burglary to break them. — altho it happens at the time when there is no one there —

The law is the same respecting all buildings that are within the curtilage of the house. — but not without by 6. L.

A shop with goods in it are not within the law by Statute for the protection of property in Bur. it has been determined that every thing built for the protection of goods is within the definition of a house — So too in Bur. the rule has been extended to vessels, packets, stores, shoe shops &c —

4 Co. 40. Kelinge 27. 52. Pop. 42.

There must be a breaking: not a mere legal breaking viz it amounts as going in the open door in the night. — are entry thro — door or window when is not breaking thro it would be trespass but if it be shut it is enough so that lifting a latch is enough. — Kelinge 52. Hutton 20. Co. 64. 65. So crawling down chimney is breaking —

a f. person may be let into a house and while it be breaking, or if fraud is practised by answering a friend when asked who was there — or when the villians entered by means of a constable procured on false suggestion So if an accomplice admits them —

There must be an entry — thus it would be an entry if one put in his arm or a stick to get the goods so the putting a

If one watched while another entered, the watcher is deemed to have entered. — Keyling. 111.

key in the door when nothing more was done was enough
an entering; so holding a pistol a foot way within a win-
dow — So if one puts his foot on the sill of the door and
is there frightened away — 4 Rolling 111

It must be with an intent to commit felony it is not necessary
that felony should have been actually committed. Show. 53
Hea. 481. 1 Hawk 164.

The punishment of burglary by E.L. is
death without benefit of clergy — In U.S. it is different
in different states. in some states it is death for the second offence
in Conn. it Newgate —

Perjury

Perjury is defined to be false swearing, wilfully in a point
material in the case by a person under oath administered by
lawful authority, upon some proceeding in a court of justice

The oath must be administered by a per-
son qualified to administer it by law. 1 Hawk. 318.

A man may be guilty
of perjury when the fact he swears to is true. is absolutely
true if he mentioned it to be otherwise than he swore
it was — or if he be the more nothing of the fact if he
swears concerning it —

It must be done wilfully as a man may
swear positively to fact concerning which he was mis-
taken this would not be false swearing 5 Mod 315. 10 Mod. 195
1 Salk 513. 1 Hawk 319. neither would it be if he were surprised

So it would be perjury to swear falsely before persons appointed to transact some public business or proceeding.

It must be relative to some proceeding in a court of justice — it need not be given in court viva voce perjury may be committed before persons authorized to take an affidavit or deposition —

It is perjury if a man swears wilfully to what he does not believe —

But if it relative to something not before court it is not perjury — as an oath of office is not the object of perjury 1 Hawk. 319.

It was a long time questioned whether a perjury could be committed before arbitrators. but it is now settled that they are a court & false swearing before them is perjury —

But there can be no perjury predicable on an official oath. or private affidavit or provisory oath Cro. Eliz. 185. 609. 168. 907 1 Roll. 39. 2 Roll 257.

It must be administered by lawful authority. 4 Bl. 137. Arbitrators cannot administer an oath & if they do, perjury is not predicable on it. unless one of them is a justice or they must call in a person authorized to administer the oath —

This has raised a question, wd. a church court suppose they can try the case where in fact they cannot — If the governing principle was that

it is perjury if any one is injured by the false swearing as an individual. it would not be perjury — but that is not the principle — for the witness knowing nothing of the fact as to the jurisdiction he is just as guilty — the injury to the community is the ground principle & it is perjury. — 1 Vent. 181.

If a man swears the fact to be as he believes it to be it is never perjury —

A deposition is always falsely made when a man swears a thing to be so when he knows nothing about it. or believes it to be otherwise — 3 Mod 222. 1 Hawk 322 Palmer 292

Some rules are laid down in the books that are now laid aside — It was said that the witness must swear absolutely — a man might in this way cover up all the perjury in the world. — and the old rule is done away — but if a man says I am really at a loss it really is not evidence & of course no perjury — so that positive swearing is not necessary. It must be in a point material. now witnesses tell long stories and something not material is not foundation of perjury —

But if a witness tells his story to be artful to gain confidence by a smooth story to gain credit & the story is false this nothing to do with the main point it is perjury Cro Eliz 570. 1 Salk 514 Carth 422. Palm. 382. 1 Hawk. 324 for here it is not to all intents immaterial. —

It is not so also why the party injured by forgery could not recover the actual damage & offence, besides the amount of the forgery, for they were intended [illegible] as [illegible] them. Reason was different —

Statutes have made many things forgery that were not so by C.L. tho there is nothing which was forgery at C.L. that is not so now.

How far material has been a question. Is it relevant or does it conduce to prove the point. that is the principle 2. Ray 258. 889.

Subornation of perjury is nothing more than inducing a man to swear falsely, and is punished exactly as perjury is. 1 Hawk 325.

This punishment was very severe it was death. afterwards the barbarous punishment was introduced of cutting out the tongue after that banishment — Now the C L punishment is fine imprisonment & the pillory at discretion or the criminal is guilty of the crime false he shall never after be a witness

The statutes of the several states as far as I have seen there give a remedy over by private prosecution in penal action to the person injured — this does not do away his liability to public prosecution unless expressly so provided — some states have limited the time of imprisonment others have left it as at C L. to the discretion of the court.

Forgery —

Forgery at C L. was making or altering any record or any the authentic matter of a public nature or any deed or will with an intent to pervert justice

The indictment charges that of county not of record of [illegible] the writing

the [illegible] forging a writing not under seal or not of record
[illegible] not be forgery the [illegible] misdemeanor.

and equity — 1 Hawk. 335 —

Under the head of record is included. records or judgments of courts or statutes of a private nature

By authentic writing of public nature is meant records of births deaths, marriages or certificates of them. or proclamations or grants by courts. — affidavits

By deeds are meant instruments under seals as deeds of lands notes &c. but not notes without seals (tho' these are included) by statute) so to wills covenants & bonds. —

Many new things are the subjects of forgery by Statute. — Our statute reviled states all kinds you can think of & then says all other writings. 1 Hawk 335. Geo Eliz 2 96. 353. 1 Roll 66.

It will be necessary to mention examples to explain this subject. — A sells to B by deed & then afterwards sells the same land to C & to carry on the cheat he antedates his last deed to cheat B this is forgery you will remember if it is not done to prevent justice & equity it is not forgery now we will suppose a case — A borrowed money some time since & now to secure to B all the interest he antedates the bond this is not forgery — so that antedating of itself is not forgery 1 Hawk 336 Moore 655. 759. that is this is to be our holden star in cases of this kind. —

A decision entitled a legacy which he was [illegible] to the issue of that person's testator, the [illegible] was considered as property.

Lettering 'half' into a coat before 'death' [illegible] [illegible] [illegible] attorney [illegible]?

In the case before mentioned of inserting the legacy he did no other effect than giving a man property to which he was not entitled & making an addition to the will but here there is merely an omission & it would be wrong indeed to destroy the will on this account.

A scrivener writing a will for the testator & finding some interest that his friend should have a legacy he introduced one without the knowledge of the testator & omitted reading that item when he went for signing. — It was forgery being an attestation

If a man

writing a note over a blank name with a design to cheat it is forgery — but not without. — It is however dangerous to meddle with these things. If to carry on the joke the man had denied the note & the drawer had persisted it would be forgery.

The following case is a very old one — A man made a bargain to make his neighbour indebted to him 100 marks the bond was drawn for £100 and the owner when he got home finding the bond larger than it ought to be altered its back to 100 marks the bond was made void but as the alteration was not made with design to cheat it was not forgery.

A man was directed to insert a legacy in a will and he omitted to do it & read it as if he had. was it forgery? — if it is the whole will must be considered as a forgery as being different than was intended this case does not appear to have been determined. — There is a mere omission — not doing in itself is not forgery

1 Hawk 337

Punishment of this crime is fine ~~fine~~ imprisonment and pillory at discretion C.L. By Eng Stat it is now death And in U.S. it is severely punished as it is a great offence in a commercial country.—

Robbery

Robbery is a felonious violent taking away from the person of another his goods or money no matter how little — it is likewise added putting in fear but this is never laid in the indictment & not necessary to be proved so I think the addition made by the law presumes the putting in fear if the other parts of the definition are established

The goods must be taken away feloniously — with a view to steal. — if not so however violent matter no odds if not done feloniously — Neither is it robbery unless done with violence for simply stealing is not robbery.

By violence is meant some act by which the man sees his life is endangered or by words used — the delivery may be peaceable L Hawk 147

If the goods are once taken, giving them back does not purge the robbery — as is sometimes done by high minded robbers 1 Hawk 147.

So the delivery must be in consequence of the fact this is the criterion –

The property must be taken — The robber cut a girdle upon which was attached the purse that was frightened away before he pretended it up — it was not robbery — 1 Hawk. 148.

Any one who is by watching is guilty of the violence & as much a robber as the principle. —

We find in the definition that the taking must be from the person. — Case — Robbers order the man to deliver up the cattle in a certain tot — the court held it taking from the person since it was personal property 1 Hawk 148. & in his possession. 1 Salk. 613. Carth 145.

It is true that it must be such taking as would tend to make a man afraid before delivery — So privately taking a watch from one's pocket privately is not robbery whatever violence may follow. So a threatening aspect such as is used by stealing baggage is sufficient. Hawk 6. L. 128.

Threatening to murder a crime upon a man would be force enough as occasioning fear & he says parony to prevent it. Kelinge 70. — The case are when the changing is false. —

This species of theft has no relation to the value of goods taken. I mention this because at 6. L. if the property taken in theft did not exceed 13d the law did not punish it with death. — This crime of Robbery is punished with death at 6. L. & so in most of the states. For 6th. if the Robbery is effected without weapons so that life is not endangered the punishm.t is for life — otherwise for life —

Benefit of clergy was intended to give relief in the case of a felony. —

& where so taken the punishment is death & forfeiture of goods and chattels at C.L.

Mere asse[illegible] the [illegible] bailee cannot be the subject of larceny, but now if person that has the mere use of a thing when bailee is in theft & if the person in terms offa

The offences of Burglary and Robbery are commonly called compound Larceny and are excluded the benefit of clergy — but the species of theft now to be mentioned are simple larcenies which are again divided into grand — petit Larceny. Petit larceny is stealing in value less than 13$ In general same species of punishment is applied to grand as petit larceny but in different degrees.— The present value of 13$ above what it was when the rule was established gave great latitude to juries in construing the meaning of the rule—

Theft or simple Larceny—

Theft is defined to be the felonious taking and carrying away the personal goods of another by any person not from his person by violence this would be robbery nor in the night season that would be burglary — from his house 1 Bank. 134

It must be feloniously that is with the animus furandi.* A man may take with out liberty & will not be stealing neither will it if he claims it.— So taking a horse for any other purpose than to steal it would not be theft. so if after using he turned up the horse it is not theft

If bailment is procured with a view to steal it is theft but if an after tho't it would not be theft but if circumstances show on bring the horse to gate Slaven

[illegible]

Case of [illegible] finding the Writer [illegible] [illegible] of the [illegible] in a [illegible] [illegible] of the [illegible]

If a writer takes too much 'tis he is a thief, but if he keeps the whole for a quot. — The [illegible] [illegible] the whole is [illegible] a thief, but if he takes [illegible] But if [illegible] delivered to a [illegible] [illegible] the [illegible] of [illegible], it is theft the [illegible] is [illegible] of the continuance of the [illegible] — but the [illegible] of ~~the~~ [illegible] the Editor to [illegible] to do [illegible] [illegible]! [illegible] 36 [illegible].

& he is met seen at Hartford offering the horse for sale it would shew the animus furandi - unless the circumstances plainly shew his intention originally to go to Sharon. — Leach. Cr. Law. 355. ~~[illegible]~~ 153.

Another sort of case where the goods are delivered in bailment attended with benefit to the Bailee — as corn carried to Mill. — it is delivered to be ground & hastily removed is tale he is a thief ~~of the steals it~~ 1 Hawk. 130 Kelinge 35. 43. 1 Roll 73. Moor 246. Poh. 84. 1 Sid. 254 so of a common carrier.

Case. A steals from B & then C steals from A. it was said C was not a thief because A had no property but the court said the property was never changed by stealing & C was convicted of stealing from B.

Crimes are punished only where it was committed but a thief may be punished wherever he goes with the property it is said the thief steals in every county through which he passed: but I think this a dignificable point, for the crime is only once committed. — I think the thief must be tried where he stole. —

There must be also a carrying away — The least motion amounts to carrying away. — 1 Hawk. 141

A man was found tying up sheep — so leading a horse under suspicious cir

circumstances it was carrying away — So taking some books out of the trunk he was convicted of stealing all he took & laid on the floor. So a sheep half sheared. — It was decided however in one case that as the thief only cut a bale of goods on one end was decided not be theft. so taking an carry out of the car & it lodged in the hair it was sufficient asportation.. Kelinge 318. —

To the definition of theft there is an exception as to "any person" in favour of a wife, or it is said a wife may give away the property of her husband. — But there is no authority to this point & I think if the wife was made use of as an instrument and the man took the goods animo furandi it would be theft. — 1 Hawkins

It must be personal property — so that cutting & carrying off trees or reaping & carrying off what it is no theft. but if he carrys off apples which are on the ground or they cut or wheat reaped it would be theft. — because the property has become personal in these latter cases this distinction is very nice. — it is adherence to the old maxims — "For in reality how long does it take for real to become personal property" — 4 Bl. 223

Neither can choses in action be stolen or bonds notes &c — the principle is that the thief gets no advantage by it. — But I think

that a bill payable to bearer is a species of money & may be stolen. — Some states have made bank notes the subjects of theft. but there was no occasion of it for the decisions have made it theft for they are in fact as much money as dollars suppose the bill counterfeit he took it as money and has a right to treat it so.

If a horse is stolen & sold the owner can reclaim it. But if it has been a bank bill the owner cannot call upon the man who received it for the thief — it is a matter of policy for it would otherwise be unsafe to take money for it might once have been stolen 4 Bl. 233. 1 Mod. 891 1 Vent. 187. Stra. 1737. 8 Co. 33. — 1 Hawk 141

Whenever a man takes money & passes it to bona fide holder it cannot be reclaimed by the owner —

Creatures of nature as dogs, cats monkeys &c cannot be stolen tho they are subjects of theft. — Theft cannot be committed on fish in a fishing place tho it may be if they are inclosed in a pond — 1 Hawk. 144

A man may commit theft on his own property as by secreting his own property to make an insurer or any bailee liable so if property is delivered on contract & the owner takes it to make the other contractor liable. it is theft. — Cro E. 536

Blasphemy is a crime at C.L. it is said to be the denial of being of God & offering contradictory reproaches. punished by fine & imprisonment.

By C. L. grand larceny was punished with death with benefit of clergy. Horse stealing is generally more severely punished than other theft.—

Piracy.—

Every species of theft or robbery at sea which would amount to felony if done on land is piracy — unless it is done by the inmates of the vessel when it is embezzlement & it may be done privately or publicly 1 Hawk. 152. 4 Bl. 71 2 Wood. 421

Now it must be done without authority for privateers are not pirates.—

As to the punishment of piracy it is by the Law of nations and is death. the pirate, is to be tried in an admiralty court & not that of G. L. & in all European countries except Gt. Britain is by the judge. where it is tried by jury — so it would be here as the right of trial is preserved by our constitution. — It would not be piracy if committed within the limits of a country.—

Riots.

A riot is a disturbance of the peace by three or more persons assembled together of their own head with the intent mutually to assist each other against every body that opposes them in the execution of some enterprise.—

This enterprise must be of a private nature — must be actually executed & by violence; so as to injure others & it is not material whether

[illegible]

By that time an accumulative punishment if the party does not disturb or harass the act read or recited.

the thing to be done is lawful or unlawful.

It must be by three and if there are indicted & only two convicted they are not rioters they must be all convicted unless indeed the jury find the two did it with another to them unknown.

They must be collected of their own head. 1 Hawk 293 4 Bl. 146. 6 Mod. 43. 1 Salk 595. Ld Ray. 4 84. 1 Str 196. i.e. not [illegible] by [illegible].

They must be assembled to execute a project of a private nature i.e. against an individual if otherwise is a rebellion or treason —

They must accomplish the the object. if they try & do not make out it is a rout — if they do not attempt before, then he can't fail then it is neither riot nor rout but an unlawful assembly —

It must be done with violence — in such a manner as to excite terror. — 3 [illegible]. 126 3. Dal. 1.

Whether the thing to be done is lawful or not is perfectly immaterial — for there may be a riot in abating or destroying a nuisance 3 Mod. 3. 2 Show. 235.

A Rout has all the incidents of a riot except the thing was not executed.

An unlawful assembly has all the incidents of a riot only they did not

only not execute their project but they did not attempt it. But any assembly to plan a riot is an unlawful assembly. Hob. 92. 1 Salk 594. 1 Vent. 369. 380. 1 Hawk 299. 4 Bl. 146

Every thing is such a thing as to assemble to protect house or castle 5 Co. 91. 11 Mod. 116. and it be a lawful assembly for a man to assemble his friends to protect his castle

These offences of which I have been speaking are of such nature that any Justice of the peace need not wait or warrant & may command the peace to be kept. & he is warranted if he makes a mistake. Private persons may also suppress if they choose but if they make a mistake it is at their peril. Dal 121. 1 Roll. 76.

Punishment at C.L. is fine & imprisonment but some cases hilloy at discretion however is done away by our Statutes

Battery is also punishable by fine as well by private prosecution — This is distinct from affray, which is fighting together by the ear without premeditation. 4 Bl. 145

Punished by fine —

Trial for this offence is not to be used in a private prosecution.

Usury

It is not all usury that is criminal usury — A makes a bargain with B to lend him $100 at 127% & this bargain is void — but it is no crime unless the unlawful interest is paid. — It is all criminal in our sense but I mean by the word that which is liable to public prosecution

Whenever a man receives more than the legal interest the bargain is void, if he receives more it is criminal —

If the note is good at first it is good at last tho the payer is liable to the penalties. —

If the note is ever so bad he is not liable unless he receives more than lawful Int. A gives to B a note for $100 — B did not let A have but 90. this note is void. —

A gives to B a note for $100 & B let him have $100 but B demands and receives more than legal interest it does not hurt the note but B is subject to the statute penalties. —

A wants to borrow of B $100 goes to him & tells him he wants to borrow $100. B says he must a hundred — to wit $7. when the interest is $6 & then B lets him have a hundred — the question is, is that note void or is the payer liable? — if he has received too much the note is void. if he has taken too much he is subject to the penalty. They say he has not received

too much but it is all a farce it makes no ~~adds~~ out of which contract the premium is paid –

Subpoena

against the premium is but $5. It does not alter the case. for it merely taking back part of the same loan & is the same as lending 95 & taking a note for $100.

Of Libel as a crime –

It is said sometimes that a libel is only slander written a libel must be written & all that if slander if spoken would be libel if written. yet there is a great difference – In order for a man to recover a law for slander he must be charged with a crime that would, had he committed it, have subjected him to punishment.

Every thing which has a tendency to excite a man's passions to render him ridiculous in the eye of the world. tends to a breach of the peace – or tends to prevent mankind associating with him 2 Wils. 403. is a libel –

A libel may be effected by signs & pictures without words

You may indict two at once for libel where only one can be held in slander & slander is not indictable at all

For truth when told are a likely to exist a breach of the peace as untruth, & sometimes worse. —

If it is sued by a Motion for damages. he may give the truth in evidence

But in public prosecution for private libels the truth cannot be given in evidence this has been questioned with but I think unjustly. for according to principle it is perfectly correct — and it perfectly immaterial whether the story is true or false. — and whether one or the other the public peace is equally endangered — But if the prosecution is a private one for damages the truth may be given in evidence — these are the principles of C.L.

From this it was supposed that when the public administration is libelled the truth could not be given in evidence & there was a statute made to permit it. but I do suppose that by C.L. rules the same thing might be determined as is under law by the statute. — It would be a despotism that would not allow of this. — We ought to be allowed to discuss the measures of the government. The division of one man as that he thinks different from the government is no libel — If an editor charge the government with having done what they have not done it is a libel — Further there is no occasion to use reproachful language in discussing public measures. or to ascribing to the government wrong motives. if editors do this let them suffer for it.

By enacting this statute a door is opened for giving in evidence the truth in public prosecutions, & thus from its vague language the C.L. principle is destroyed. —

There may be such books as are libellous, as those which are of an immoral tendency, or tending to excite a misapprehension of the laws of society, & this has been in terms or tried to be to an unwarrantable length & books may contain principles which you or I think may tend to loosen the bands of society but this is not the thing. Any sober discussion of any question is not a libel. — But vile books and such as tend to excite vile practices which are contrary to the laws of society are libels

This libel must be published. for if an author a libel & locks it up in his scrutoire & is not got at except by breaking it open it is not a libel. —

A private letter was considered as a libel as it tended to break the peace —

Reading libels to any family from a newspaper because it was humorous is not publishing. — But if a man sees a libel in a newspaper and goes about & spreads it. it is slander. In short it depends upon this the manner taken pains to spread it with a view of disseminating slander. —

Champerty. This as one is understood only extends to any man who purchased debts of any kind as notes bonds &c or any other evidences of debts & sued for them. it was an offence because it encouraged law suits but in process of time it became a matter of great convenience to part with such notes bonds &c & therefore it became general to sell them & this scale began to be supported by lawyers from whence it has become the idea that the laws have been obsolete in all cases but the fact is the laws remain the same so far as is necessary for the good of the public e.g. a man has money & of B & B holds notes against A they if he buys of these notes for the purpose of vexation & harrasing money the old laws remain as it was & the offence is punished by fine & imprisonment. but where such notes come in the way of trade and are received for the payment of debts the old laws is done away with. 4 Bl. 135. 1 Hawk. 525.

Upon the same principle is the law with respect to selling a disputed title to land there is an instance of preventing those sales & both the purchaser & seller are liable to punishment because it is nothing more than purchasing a lawsuit. It is the business of the party out

of possession to bring the action & get possession & then he may sell. this was an offence at C.L. the St of Westr 8th added new punishment which was inflicted in addition to the fine inflicted by C.L. this St. makes the deed void. hence it has been questioned whether in those states where there is no St. making the deed void whether it is void. the answer to this is that we are to take this into statute with them & the St. is as much binding here as the C.L. itself. Plow. 80. 88. the whole law. 6 Co. Litt 369. note.

A question of no great nature arises out of this supposed a man sell a mortgage when another is in possession claiming it. as suppose mortgagee sells would he be guilty of this offence. this is depends upon the light in which mortgages are to be considered. if the mortgagee is real property then he is guilty of the offence if personal it is not an offence. The court of mass in this state decided that it was not an offence & this I think is correct. Observe that it is no offence to sell to the man in possession for this settles the dispute. where the whole thing a purchase to speculate merely is an offence & which is aggravated if done with a view to sue otherwise it is no breach of the law. 2 Bl. 135 1 Hawk 525.

Cheating — This is sometimes a mere private injury ~~to others~~ ~~it~~ is a public offence & it is my object to shew when it is a public offence. When one man sells to another property which he knows had defects ~~it~~ is a private injury only for which an action will lie. All this kind of overreaching on making good bargains or it is called is no public offence ~~but it is~~ a public offence when ~~the~~ man by some action or conduct imposes upon the man with whom he is dealing. & this is indictable. e.g. a man goes into a store ~~at~~ ~~A.H.~~ & gets another to call him Mr Deering upon the strength of which he is allowed ~~to~~ take off articles upon credit & then runs off ~~this~~ is a public offence & indictable.

Every thing of this kind where a man appears in a style different from his usual by which he cheats it is a public offence. where a man cheats by tokens it is the same thing. so is selling by false weights & measures. — this is punished by fine imprisonment or pillory according to the nature of ~~the~~ case. & the court may make them find securities for good behaviour or commit them.

Bigamy

This is when a man has two wives at once & is an offence at C. L. and is punishable by fines imprisonment or pillory as the case may be.

Now the husband or wife is not heard of for 7 years at C. L. the husband or wife may marry again without being guilty of this offence.

Forcible Entry or detaining a man's house or land is an indictable offence. If a man attempts to get possession of his house when another is in possession or when the other remains in after the expiration of a lease it is an indictable offence if he does it by force but if he does it by artifice it is no offence because he has a right to be in possession. the reason of this distinction is a consideration of policy in order to prevent the peace. the law does not allow a man to take himself possession of his own if it will lead to a breach of the peace.

If a man comes to the house armed & brings a mob with him & threatens to attack them if they do not give up the house it is the same as if he actually entered by violence for it serves to intimidate

terror. - But there may also be a forcible detainer & if the one in possession detains a house with violence he is also guilty of a public offence & liable to be indicted. the mode of proceeding is that the party complaining calls a court & they enquire into the circumstances & they go & turn the one in poss.n out but they do not decide the title. the one so turned out may be fined - whether he can be imprisoned I don't know See Kel 256. Stra 443. L.d Ray. 1514 6 co f.o 199.

Obstructing public justice - When an officer suffers a man to escape this is an offence even where it is ag.st his will. but it is punished by nothing but a fine. Every escape by accident is called a negligent escape & however it may be ag.st his will it is an offence punishable by fine. But if it is a voluntary escape it may be punished with imprisonment. By the old C.L. where the prisoner broke prison he was punished by death. but now it is fine & imprisonment rescuing the prisoner from the officer is an offence for which formerly the party rescuing was punished in the same manner as the prisoner would have been. but now it is fine imprisonment be at the discretion of the C.

Compromising a felony is an indictable offence. — A conspiracy be

Bribery is punished in the giver & taker, bribe is first impeachment if the officer is executive, & death if he is judicial —

between two or more men to get an innocent man indicted in order to have him punished. then if the man is acquitted, the others are liable to be indicted & by C. L. they could not be jurors or witnesses their goods & chattels were forfeited & their bands forfeited for life. their houses were to be rooted up. their land ploughed & they themselves imprisoned for life & fed on bread & water. This was the old Saxon law & shews the indignation with which it viewed this offence. In Eng a modern Act makes it punishable with death if the man was indicted for a crime that was capital. but of course the punishment is imprisonment for life — In this country the punishment I suppose would be at the discretion of the courts —

Treason —

Much of the Eng. law regarding treason we have nothing to do with —

Levying war agt. the government. any attempt to change the government or forcible to change the administration. — So if any be taken to create a riot as in Gordon mob. this is treason — Arming with force to incur the repeal of a law is treason or if it be done with a view to compel the enactment of laws it is the same There are certain things which however are different from treason — as suppose there is an in

sumeration when they have none of the objects above mentioned in view but when they have some object in view & they are themselves such as these are nothing more than high handed riots.

There are certain things declared treason by St which before the Stat were not so. as when in Eng the old lords used to get their vassals together & attack each other this was in feudal times now these are declared treason by Statute & was owing to the particular circumstances of the country. This is one of the same nature as quarrels between students & sailors —

Lending aid to the enemies of the republics is treason & this whether the enemy is a foreign nation or your own countrymen who have rebelled. sending them intelligence giving them clothing &c or in short any thing which enables them to pursue their warfare is treason. But when these acts are done thro com. passion it is no treason. King v Gordon Doug. 1 Hawk 37. Hale 132 to 136 Fos. Cr. L. 211. 19. — In case of revolution when in fact the supreme magistrate is an usurper those who obey him are not guilty of treason. Words may constitute treason. there must be some overt act. 6 Co Ch. 125 — It has been questioned whether writing was treason. but now the law is that it is not. There was indeed a violation of the law in the case

of Sidney. Fos. 198. 1 Hob. 118. All are principals who are concerned in treason there are no accessories. It is laid down in the Eng. books that there must be two witnesses to convict a man of treason whereas in the other cases one is sufficient. It is said a wife may be compelled to be a witness against her husband in treason but I see no authority to support this – probably it is the dictum of some lawyer or judge on the bench. –

Homicide –

This is an interesting & important subject & there are no stat. varying the principles of the C.L. in any of the states, tho the punishments are altered by the.

Homicide includes murder, manslaughter, excusable & justifiable Homicide. There are some cases of murder not governed by the general principles, but there this is thro policy –

To constitute murder there must be malice, by malice is meant acting from a wicked, inexcusable motive it discloses the malus animus. The circumstances that attend the act must disclose the malice & be such as show an unnatural heart or the actor was totally regardless of consequences. & when this principle is not disclosed it is not murder. unless in the case of policy as I shall mention.

Involuntary manslaughter is where the man did not intend anything & where it is contrary to his wishes & intention that the act should be done that constitutes the manslaughter. —

Manslaughter

This is of two kinds voluntary & involuntary

Voluntary manslaughter is when one from sudden unexpected provocation kills another, with or without an intent to kill it does not disclose such a character as makes it dangerous for the actor to live — it is unpremeditated if he has had time to cool before the act done & after the provocation it is revenge & murder —

And you will understand that a slight provocation is no excuse — words are never an excuse — Heat & Passion are not the excuse it is the substantial provocation which reasonably excites them that constitutes the excuse. He might not design to kill but death follows from the act which he voluntarily does. — The reason why it is not murder is because he has not had time to cool —

The second kind is involuntary manslaughter & happens in two cases when a man is engaged in some unlawful project & in the execution of it he kills a man it is manslaughter. — Again when a man is engaged in doing what is lawful but does it negligently it is involuntary manslaughter — so that it must be done for the course of some unlawful business or of some lawful business negligently done.

If a man however kills another in such case the negligence it is involuntary homicide.

Another kind is excusable homicide as it is called This takes place is done in defendendo as when a man does all that he can to escape killing the man attacking him. — In some cases homicide killing is justifiable homicide as in the prevention of a felony — as killing robbers, burglars, rapers &c — there is little difference

Excusable homicide presupposes a quarrel an affray & the man is bound to do every thing he can to prevent the injury before he kills the offender — & there is no question in such cases who was to blame. —

If a man in the execution of lawful business kills another without negligence it is excusable homicide. by mere adventure or chance merely as it is called —

Justifiable homicide is the execution of a criminal by the Shff. so when an officer has arrested or attempts to arrest a criminal he is bound to take & keep him & may use violence for the purpose. — If he kills him there must be an apparent necessity — & if one is killed there wrongly it is a different thing.

Case — a child creeps into a hay mow unknown to any one — a man unwittingly in getting hay kills him it is not murder there was no malice It was not justifiable homicide as technically said for it was not done under any authority to execute public justice

It is excusable homicide by chance medley — for if one ax flies off the helve that was not to be excused it is the same

But if the ax head been used to fly off — it is not voluntary but involuntary manslaughter as done in the negligent execution of lawful business. — So was the shooting a man when one went to shoot a duck in order to steal it. —

The Eng. law is an entire deviation from this principle — that says if one is in pursuit of an act that is felony & kills a man it is murder — but if the act was less than felony it is only manslaughter. Here the criterion is exactly the same & this distinction is not followed by any court in our country & has been most carefully ridiculed by my Kent.

Suppose in our country a man in shooting a partridge kills a man without carelessness. it is excusable homicide by misadventure. —

Some games are lawful recreations as wrestling, rounds are not as throwing at cocks. — Now suppose one is killed wrestling it is excusable homicide by misadventure — but suppose one wrestles unfairly contrary to rule & the man is killed. it would be involuntary manslaughter —

Suppose a man in throwing at cocks kills another — if it was done in pursuit of an unlawful act it is involuntary

manslaughter. — The true fact of the heart is to be adduced from all the circumstances —

I give you a case a man in his wrath with a great club beats a man till he dies — it was done with an intention to do great bodily injury — for the big club — it was not an manslaughter because premeditated not in self defence — It is murder it discloses the unsocial heart the malus animus. —

A man was offended at a company, he throws a large stone in among them & killed a man he had been laughed at but had received no such provocation as to make it manslaughter it was murder. —

A man slipped a chair away from behind another who they fell & by the fall came to his end this was held to be involuntary manslaughter —

A without provocation aimed a blow B in such a manner as the killing B would have been murder — but by mistake B. was killed it was held to be murder. —

Case of reservation will explain it. — One whispered a boy in a proper manner — but unfortunately it was followed by death. it must be reasonable foreseeable by prudent

Another case the boy was whipped with an improper instrument & the boy died – it was doing a lawful act in an unlawful manner and so involuntary homicide. –

Some a schoolmaster when mad knocked down & killed the boy with a pt. of tongs it was held to be murder from the instrument. –

A man on the roof gives warning sufficient & throws off a man was killed. – There was no malice or design to kill or do bodily hurt – It is excusable homicide by misadventure if it had been done with inattention It would have been involuntary manslaughter although it was not usual for people to pass there but if carelessly done in a village much more in a city, it has been held to be murder as showing the antisocial heart.

A driver of a team killed a child without carelessness by driving a wheel over it. There is no guilt. It is excusable homicide by misadventure. –

But the teamster neglects the team in a street as by leaving it & a child is run over. it is involuntary manslaughter – And if with the team & gives orders to the children to go off but drives on & kills one it is murder. –

It was held to

be murder to drive a mad bull into the street

A squib to make sport was thrown into a crowd & one was accidentally killed — The business was unlawful & that constituted it involuntary manslaughter —

Another case was the same only the squib was very large & dangerous the act was held to be murder. —

A man had been invited to a dinner — he knew there was a pond near his friends house about which there was game — he loaded his gun & took it along — drew the charge because as he found no game. — a gentleman an afterwards catching the gun loaded it & returned it to its place — the owner in attempting to shew his wife how it would fire kills the wife whom he dearly loved. — this was determined wilfull homicide by misadventure because there was no want of due caution. — This case was tried by Judge Foster.

With respect to justifiable homicides L.d Coke says that if a sheriff should execute a man in obedience to the warrant of a court who had no authority it would be murder but this I take to be wrong — the only ground of it is a technical rule that every man is bound to know the law — but here the officer did as

Homicides for the advancement of public justice are when an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults him. — If an officer, or any private person, attempts to take a man charged with felony & is resisted, & in the endeavour to take him kills him — in these cases there must be an apparent majority. 4 Bl. 179

he that its his duty to do without the malice aforethought. The most that can possibly be made of it is involuntary manslaughter from the gentlemen's. Again with respect to justifiable homicide there is a distinction attempted to be made — An officer may take the life of a criminal if he cannot retain him without. but suppose he had escaped could you shoot at him after he had been over taken? — it is said if the criminal was guilty of a felony charged with or felony might but if of trespass only you may not. — I very much doubt the propriety of this distinction. it might be a good rule if any person charged with a crime was guilty; of intimating as far as possible — when one does so & is still pushed he may defend himself at any hazard —

It has been said that it is manslaughter if the killer is the attacker but there is really no difference — If the man killed had killed the other it would have been manslaughter. but it is in both cases inevitable homicide. he defendeth —

There is a case in the books when one attacked another on purpose to bring on a quarrel in which he might kill his enemy it was called murder —

Manslaughter might be a most awfull act with an intent to kill or do some great bodily hurt & death ensues voluntary

It must be upon a sudden quarrel & it is murder if he had had time to cool. It is not the injury that constitutes the crime for if so it would be equally strong in both cases — that it is the absence of proof of the unprovoked heart. Being in a passion is not itself the excuse. it must originate in some personal abuse. words do not amount to it. —

The intention to kill is to be learnt from the weapon used. By an unfortunate blow of a cowhide applied to resent an insult by words: occasioned death. it was determined not to be murder — for from the instrument used it is plain that there was only an intention to chastise involuntary not to take life.

A man caught a boy stealing wood. enraged tied him to his horses tail & whipped upon the horse the boy died here tho there was no proof of intent to kill it was held murder. —

Another case a boy was whipped by another & the father enraged sent a knife struck the other boy by which he died it is stated in some reports to have been determined manslaughter — this has been doubt wrong — circumstances will alter the case much — A great deal depends upon the

[illegible] way [illegible] to prevent — refer when the [illegible]
[illegible] — [illegible] —

instrument used. – some say he followed the boy with a whip some with a cudgel – this is the great point in my opinion.

The husband kills the adulterer when caught in the act it is manslaughter but if he had time to cool it would be murder. –

There are cases where the general principles to policy & in most of these the malice cannot appear or does not. –

In all cases where an officer is killed in the execution of his official duty in whatever manner it is done it is always called murder there is no enquiry to be made with respect to the malice aforesaid. –

Even if an officer should make a mistake & take an innocent man he must submit & if the officer is killed it is murder: tho if the arrest had been by a private man & the one arrested had killed him in his own defence it would have been excusable. –

There are instances of jailors having been convicted & executed for killing prisoners as when one put a prisoner in a cell where he took the small pox [illegible]

The mother of an illegitimate child is liable for murder of the child as for a crime. In that State infanticide has never been a crime, without proving the child born alive, precisely as required by the statute —

In some of the states there is a difference in the species of punishment of these crimes. — In Conn. the punishment for voluntary, is forfeiture of goods & chattels in addition to the other penalties & is only inflicted in this case. — Involuntary is hardly punished at all. the court inflict a fine at the pleasure.

* But if the court had jurisdiction of manslaughter, only, the should not be alone —

In several states duelling is declared murder. in many cases there is a total want of malitia & the act is a consequence of only a mistaken sense of honour.

For the prevention of duelling it has been made that every man on admission to an office must swear that he has not been engaged in any duel since the enactment of the act & that he never will be. this is the law of Virginia & N. York

Punishment of Murder is Death. of Manslaughter it is fine & imprisonment & burning in the hand. - the punishment is the same in quality in voluntary & involuntary. but different degree

Excusable homicide was formerly punished by a forfeiture of goods & chattels. It has however been the fashion to use it that so that a verdict of guilty in such case is now only an acquittal. -

If a man is indicted for murder the jury may find him guilty of manslaughter if the court has cognizance of both. -

A man is indicted for murder - the killing is proved. then the proof that it was not murder belongs to the prisoner. Hawk. P. Cr. Lead. in. Law Bl. Com. -

Finding sureties to keep the peace is sometimes part of the punishment & sometimes when it is not when there is no conviction. — It is most commonly taken at the suit of private persons, when on affidavit the warrant issues. —

The law as it respects binding over to keep the peace & also binding over to good behaviour

Sureties of the peace are sometimes made part of the punishment. it being part of the judg.t by law & here there is no discretion as it regards the sum.

In other cases it is discretionary & as in breaches of the peace in presence of an officer - he may bind over. in opinio it is not necessary that there should be an actual breach of peace. if there is any appearance of a danger of it. this is not part of judg.t

If not done in the presence of a magistrate - but the offender is brot before him at the he cannot have cognizance of the case he may bind over: not as pt of the punishment for there is no conviction. but only evidence of a breach of the peace

There is another class of cases as when one is afraid of his life or of great bodily hurt. if there is reasonable ground of fear the threatener may be bound over to keep the peace - this is a remedy given to husbands & wives. tho they have no action ag.t each other - and the oath of the party is part of the evidence you will observe.

This binding to keep the peace is upon some fear of a breach of it.

Bending to kiss, the prince is an ancient as the L.E.

Walk in the night. sleep in the day. vagabond, who are those. no one knows whence he comes the white he goeth. Ridiculed in Eng as a Cuckold.

If the recognizance is forfeited the money belongs to the public.—

Binding to good behaviour you will observe it is a different thing — It is a part of the punishment of some crime and depends upon a St of Ed. 3. & proceeds upon the ground of securing obedience to the laws of the land — Such as persons not of good fame who may not have been convicted — it depends upon the character — This statute is a singular thing & has been copied by most of the States. — By it Justices are empowered to bind to good behaviour all common drossers, vagabonds all those who act contra bonos mores. You will do very wrong not to help a lady in distress it would be contra bonos mores —

If the security is not found the offender is committed of course & unless confined untill the county court comes —

In the commitment in both cases must state the ground of the offence that the cause of it may appear. The bond is never forfeited if the person keeps the peace or good behaviour. The justice must state all the facts proved to the next court.

This recognizance may be discharged by the court at discretion, or if the person at whose instigation it was taken or if he is no longer in fear cf Hawk 126. 129 all the cost must be paid before he is discharged

This bond is forfeited by the commission of any act that would be ground of taking it — any breach of the peace — or that which leads to it. but reproachful words or a turn off or lands are not sufficient. a challenge to fight however is —

attachments. There is a mode of proceeding against an offender by attachment by which he is committed summarily — as for any abuse, improper conduct in or near the court. or insolence to any officer of the court. — The court directs the clerk to draw an order to bring the man before the court immediately & if he does not give a good excuse he is committed that can be confined in this way only during the session of the court. he may afterwards be prosecuted for the contempt. —

So where a man refuses to obey a peremptory mandamus the commitment here is to force obedience & he may be confined until he obeys —

There is another kind of attachment against the officers of the court as Shff. jailor Atty. Jurors &c for contempt. — as if Shff takes unlawful fees or any neglect of duty he or either of the others may be committed at discretion for a limited time. Atty. too are not only liable to be thrown over the bar but to be committed

1 Hawk 142
1 Salk 84
1 Stra. 185.
4 Ld 4. 546
6 mod 73

So jurors for receiving a bribe referring to be sworn — or to try a case — So appears to appear so it is with witnesses —

Any legal rule of court making the duty of a man to perform certain duties if they do not they are liable to attachment

The mode of proceeding is if not immediately in the presence of the court an affidavit is made & an order is issued to the man to show cause. & if he does not show good cause he is committed: in this case he is bound to answer all questions under oath that are put to him for this is not such questions as would tend to criminate him — & what is very singular if the man clears himself by swearing the court proceeds no farther but leaves it for any one to prosecute for perjury — [illegible]

E.D.

Haw. Pb. 96

Ind. 97
1 Lw. 209

Bail

In most cases if a man is arrested he may be admitted to bail on finding security to appear in court.

The security is called the bail & has the security of the prisoner just as the officer had. — the body is pledged to the bail who can take it wherever he finds it. it is his property — not as an officer but as to his own property — even in Virginia if he runs there with the money called bail prevents from the court of being bailed. — He may also commit him when ever he pleases. —

If the man runs off & the bail is liable & paid up — & the offender returns he may be again arrested & tried. — unless the St. of limitations destroys the indictment. —

The C L appears to be that all offences except homicide were bailable — even treason was a bailable offence if bail was found before commitment. in other cases bail might be taken any time after commitment. —

The old law was that no bail could be taken after commitment — but the old law has been altered —

The supreme court may bail in any —

Hale 98.
Latch. 12
5 Mod 323

1 Salk 183
1 Bulst 85
5 Mod 554

case. but it is discretionary & not demandable as in those cases where bail is allowed by law specifically.

Treason & murder are now deprived of the privilege of bail as much as homicides. so also lunatics of prisons — & things taken with the stolen property upon them Hale 101 so when the offence has been confessed.—

I observed that there was no bail after conviction to this. there is no exception, if a physician of respectability will certify that confinement endangers life.—

The Judges courts are very careful about granting bail when other magistrates cannot as in R Stra. where a man stabbed himself to get bail by endangering his life. the courts refused bail

Salv. 99.
1 Sid. 614

Palm. 388
Show. 399
Salk 460

Stra. 679
1 Vent. 68.

Of Indictments & informations

It was a gen.l rule of the C.L. that there must be a trial before the grand jury before the indictment is laid in court. for all criminal prosecutions, except when a thief was taken with the goods in his possession. But our customs have made it usual to omit the trial before the grand jury — & as I think reasonably — the spirit of the rule not being neglected for it was formed in the severity of the punishment of felony.

Where a statute makes an act criminal the particular process must be followed as laid down in the statute

Where the penalty is merely pecuniary it never goes before the grand jury.

Informations are carried on before the court without an intervention of the grand jury —